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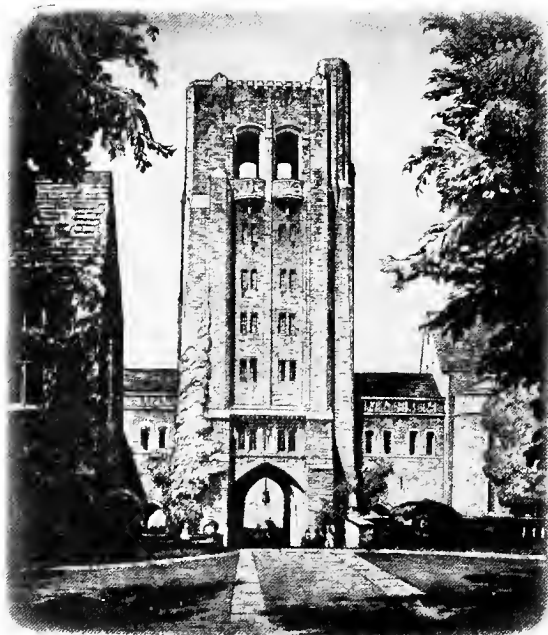
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The law and practice of provisional reme



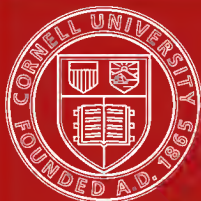
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THE
LAW AND PRACTICE
OF
PROVISIONAL REMEDIES,
WITH AN
APPENDIX OF FORMS.

BY
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COUNSELLOR AT LAW.

ALBANY, N. Y.:
W. C. LITTLE, AND WM. GOULD & SON.
NEW YORK:
DIOSSY & COCKCROFT.
1867.

~~A 19421~~

~~74 A 18~~

B42070

Entered according to Act of Congress, in the year 1867,

By ISAAC GRANT THOMPSON,

In the Clerk's Office of the District Court of the United States, for the
Northern District of New York.

J. MUNSELL, PRINTER,
ALBANY, N. Y.

TO THE

HON. CHARLES R. INGALLS,

J U S T I C E

OF THE SUPREME COURT OF THE STATE OF NEW YORK,

This Work is Inscribed

AS A TESTIMONY OF RESPECT FOR HIS PUBLIC AND PRIVATE
VIRTUES, AND OF HIS KINDNESS TO

THE AUTHOR.

PREFACE.

A thorough knowledge of the law and practice of Provisional Remedies is indispensable to the practitioner, not only from the constant necessity of resorting to them, but also from the fact that the exigencies of the case frequently demand great haste, and render impossible the requisite reference to scattered authorities. For these reasons among others, a treatise upon these remedies, both accurate in detail and concise in the enunciation of principles, is of great importance. To furnish such a treatise has been my object in the preparation of the following pages. How well I have succeeded, I leave to the just discrimination of a liberal profession to decide.

I have sought to collect all the decisions, of any importance, which have been made touching these remedies, and to arrange them for prompt and easy reference. I have depended mainly on the decisions of the courts of this state, where there were any in point, as they are the only controlling sources from

which an interpretation of these remedies can be derived, especially in what regards the practice.

In quoting the sections of the Code, I have varied somewhat from the order in which they are therein given, for the purpose of securing, what I deem to be, a more natural and systematic arrangement.

While I have had no hesitation in making use of all works within my reach, treating on the same or kindred subjects, still I have spared no reasonable endeavor to examine for myself the cases cited.

I cannot let this opportunity pass without expressing my grateful acknowledgments to T. S. Banker and Francis Rising of this city, counsellors-at-law, for the kindly aid they have given me in the preparation of this work.

That the labor could have been more successfully performed by other hands, I know; but not, I believe, by any, who could have sought more earnestly, to do it well. "And if I have done well and as is fitting the story, it is that which I desired; but if slenderly and meanly, it is that which I could attain unto."

I. G. T.

TROY, *October*, 1867.

CONTENTS.

CHAPTER I.

ARREST AND BAIL, - - - -	9-139
--------------------------	-------

SECTION.

- I. General Principles.
- II. Where Defendant is Non-Resident. For Injuries to Person, Character or Property.
- III. Arrest for Fine; Penalty; on Promise to Marry; or for Fraud of Officers, Agents, etc.
- IV. In Actions for the Recovery of Personal Property.
- V. Fraud in contracting a Debt, etc.
- VI. Fraudulent Removal, etc., of Property; Arrest of Females.
- VII. Affidavit to obtain Order.
- VIII. Security on the Part of the Plaintiff.
- IX. Order of Arrest, by whom made and its Form.
- X. Arrest, when and how made.
- XI. Bail, how given.
- XII. Justification of Bail.
- XIII. Deposit instead of Bail.
- XIV. Surrender of Defendant; Action against Bail.
- XV. Exoneration of Bail.
- XVI. Sheriff, when Liable as Bail; Bail, when Liable to Sheriff.
- XVII. Vacating Order of Arrest; Reducing Bail.
- XVIII. Arrest on Execution.

CHAPTER II.

CLAIM AND DELIVERY,	- -	141-193
---------------------	-----	---------

SECTION.

- I. Nature of the Remedy, and when allowed.
- II. The Affidavit.
- III. Security by Plaintiff—Requisition and how executed.
- IV. Exception to, and Justification of Plaintiff's Sureties.
- V. Redelivery to Defendant.
- VI. Claim by Third Party; Filing Papers; setting aside Proceedings.
Arrest of Defendant, etc.

CHAPTER III.

INJUNCTIONS, - - - - -	- -	195-345
------------------------	-----	---------

SECTION.

- I. Nature and Purpose, and by whom granted.
- II. When granted. General Principles.
- III. Trespass and Waste.
- IV. Easements and Servitudes.
- V. Nuisances.
- VI. Covenants relating to Real Property.
- VII. Roads, Rail Roads and Bridges.
- VIII. Taxes and Assessments.
- IX. Contracts.
- X. Patents, Copyrights, Trade Marks and Signs.
- XI. Negotiable Instruments, Deeds and Stock.
- XII. Restraining Suits and Judgments.

SECTION.

XIII. In Creditor's Suits.

XIV. Corporations.

XV. Partners, Public Officers and other Parties.

XVI. Restraining Acts Pending Litigation.

XVII. When granted; the Affidavit.

XVIII. Order to show Cause; after Answer; against Corporations.

XIX. Security.

XX. Form, Service of, and Obedience due Injunction.

XXI. Dissolving and Modifying.

XXII. Assessment of Damages.

CHAPTER IV.

ATTACHMENTS,

347 - 461

SECTION.

I. In what Cases granted.

II. The Affidavit.

III. The Undertaking.

IV. The Warrant, by whom granted and what to contain.

V. What Property may be attached.

VI. How Warrant executed.

VII. How served on Property incapable of Manual Delivery.

VIII. Perishable Property. Where Property is claimed by Third Person. Vessels.

IX. Effect of an Attachment.

X. Judgment, how satisfied. Action by Plaintiff. Where Judgment is for Defendant.

XI. Discharge of an Attachment.

XII. Return of Warrant. Sheriff's Fees. Costs and Allowances.

CHAPTER V.

RECEIVERS AND OTHER PROVISIONAL REMEDIES, 463-565

SECTION.

- I. Receivers, Nature of, and how appointed.
- II. General Powers and Duties of.
- III. In what Cases appointed.
- IV. After Judgment.
- V. In Supplementary Proceedings.
- VI. Receivers in Creditor's Suits.
- VII. Receivers of Corporations.
- VIII. Other Provisional Remedies. Deposit of Money, etc., in Court.
- IX. Satisfaction of Part of Claim admitted due.

CHAPTER VI.

WRIT OF NE EXEAT, - - - 567-575

APPENDIX.

APPENDIX OF FORMS, - - - 577-651

PROVISIONAL REMEDIES.

CHAPTER I.

ARREST AND BAIL.

SECTION I. General principles.

- II. Where defendant is non-resident; For injuries to person, character or property.
- III. Arrest for fine; penalty, on promise to marry; or for fraud of officers, agents, etc.
- IV. In actions to recover personal property..
- V. Fraud in contracting debts, etc.
- VI. Fraudulent removal, etc., of property; arrest of females.
- VII. Affidavit to obtain order.
- VIII. Security on the part of the plaintiff.
- IX. Order of arrest, by whom made and its form.
- X. Arrest, when and how made.
- XI. Bail, how given.
- XII. Justification of bail.
- XIII. Deposit instead of bail.
- XIV. Surrender of defendant; action against bail.
- XV. Exoneration of bail.
- XVI. Sheriff, when liable as bail; bail when liable to sheriff.
- XVII. Vacating order of arrest; reducing bail.
- XVIII. Arrest on execution.

SECTION I.

GENERAL PRINCIPLES.

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|--|---|
| <ol style="list-style-type: none"> 1. § 178. No person to be arrested, except as prescribed. 2. Similarity to the old practice. 3. How the law to be construed. 4. Discretion of court in granting order of arrest. 5. Order must relate to the whole cause of action. 6. Liability to arrest must be personal. 7. Action must be maintainable. 8. Arrests at the suit of assignees. | <ol style="list-style-type: none"> 9. Assignment of cause of action. 10. What causes of action are not assignable. 11. What are assignable. 12. Corporations may assign. 13. Defendant not liable to be twice arrested. 14. When arrests may be renewed. 15. Non-resident may have the remedy. 16. Effect of a stay of proceedings. |
|--|---|

1. "No person shall be arrested in a civil action, except as prescribed by this act; but this provision shall not affect the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26th, 1831, or any act amending the same, nor shall it apply to proceedings for contempts."¹

2. The provisions of this chapter of the Code are substantially the same in most respects, as the former statutes relating to arrest in civil actions. The intention of the commissioners of the Code, in this behalf, is expressed by them as follows: "We have adhered generally to the principle of the existing laws; although, in some respects, we have restricted the right of arrest, and particularly by requiring, in all cases, an order of a judge. We have also provided, that, before an arrest, the plaintiff must give security to pay the defendant's costs, and whatever damages he may sustain by the arrest. We have also proposed that the defendant may make a deposit of money, in all cases, instead of giving bail."²

¹ Code, § 178.

² See their Report, p. 160.

3. To justify an order of arrest, proof of actual intent ought, in all cases, to be required. The constructive guilt of a debtor, who is innocent in fact, can never be a sufficient ground of imprisonment. Laws like these under consideration which restrain natural liberty, ought to be so interpreted, as to receive all practicable mitigation in favor of equity and humanity.¹

4. The granting or refusing of an order of arrest lies in the discretion of the court, to be exercised according to the circumstances of each case. It should not be granted on light grounds, nor in doubtful cases.²

5. An order of arrest must relate to the whole cause of action, and not to a part of it; and therefore where there are two or more causes of action joined, on one of which the defendant is not liable to arrest, no order of arrest should be granted.³ A plaintiff is concluded from resorting to a provisional remedy, by uniting in his complaint causes of action to some one of which the remedy does not apply.⁴

6. The liability of the defendant to arrest must be personal, or an order cannot be granted. Thus, a husband, though civilly responsible for the acts of his wife, cannot be arrested for those acts.⁵ So, a principal is not liable to arrest for the fraud of his agent, unless he participate in such fraud or knowingly ratify it.⁶ But the later decisions hold, that where one partner has been guilty of a fraud in purchasing goods or obtaining credit for the use of the firm, and which were used by the firm, all the partners may be arrested in an action against the firm

¹See *Pacific Mut. Ins. Co. v. Machado*, 16 Abb., 451; *Caldwell's case*, 35 Barb., 444; *Spies v. Joel*, 1 Duer, 669.

²See *Davis v. Scott*, 15 Abb., 127; *Lapeous v. Hart*, 9 How., 541.

³*McGovern v. Payn*, 32 Barb., 83; *Lambert v. Snow*, 2 Hilton, 501;

see *Smith v. Knapp*, 30 N. Y. R., 581.

⁴*Id.*

⁵*Anon.*, 8 How., 134; 1 Duer, 613; see *Baldwin v. Kimmell*, 16 Abb., 353 note; see *contra*, *Solomon v. Waas*, 2 Hilton, 179.

⁶*Clafin v. Frank*, 8 Abb., 412.

to recover the debt, although part of them were ignorant of the fraud.¹

7. To enable a plaintiff to maintain an arrest of the defendant for a wrong committed, he must show himself entitled to maintain an action to redress such wrong.² Therefore, where the action is barred by the statute of limitation, and the defendant avails himself of that defense by answer, an arrest is not maintainable. But a defendant will not be discharged from arrest on the ground that the action is barred by the statute of limitation, unless he set up such defense in his answer.³

8. As a general rule, the assignee of a right of action is entitled to the same remedies to enforce such right, as the assignor would have been entitled to; and a cause of action on which the defendant is liable to arrest, does not lose its character as such, by being assigned by the original creditor. The assignee may enforce it, by arrest, in the same way as the original creditor might have done.⁴

9. There are, however, certain causes of action that are not the subjects of assignment. In general, a cause of action for an injury done to the person or personal feelings cannot be assigned. But, if the substantial cause of action arises from an act that diminishes, impairs, or in any way affects property, it passes by assignment. Torts for taking, converting or injuring property, and, in fact, all causes of action that survive to the personal representatives, may be assigned.⁵

10. Among the causes of action that are not the subjects

¹Townsend v. Bogart, 11 Abb., 355; Coman v. Allen, 21 How., 114; and see Sharp v. Mayor of N. Y., 4 Barb., 257; see contra, Hanover Co. v. Sheldon, 9 Abb., 240; Wetmore v. Earle, 9 Abb., 58 note; see further on this subject, post, sec. 5, pl. 13.

²See Neville v. Neville, 22 How., 500.

³Arthurton v. Dalley, 20 How., 211.

⁴King v. Kirby, 28 Barb., 49; Grocer's National Bank v. Clark, 32 How., 160.

⁵Butler v. N. Y. & Erie R. R. Co., 22 Barb., 110; People v. Tioga Com. Pleas, 19 Wend., 73; McKee v. Judd, 2 Kern., 627, per Hand, J.; Hyslop v. Randall, 4 Duer, 660.

of assignment, are actions for assault and battery, slander, libel, false imprisonment, malicious prosecution, breach of promise of marriage, and malpractice.¹ So, a demand for damages for the seduction of a female servant is not assignable.² So, a right of action for damages caused by false and fraudulent representations of the solvency of the purchaser of goods cannot pass by assignment.³ Nor, a cause of action for damages arising from the fraud and deceit of the defendant in the false reading of the hour of appearance named in a summons served upon the plaintiff in a justice's court.⁴

11. Among the causes of action which may be assigned are the following: A cause of action for the taking and conversion of personal property, but the assignee should, after the assignment, make demand of the property, notwithstanding the conversion was before the assignment;⁵ a cause of action against a common carrier for loss of goods, or for negligence in not delivering goods;⁶ a claim for damages to personal property;⁷ an action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association;⁸ or for the conversion of funds entrusted to an agent, and for which he has failed to account;⁹ a right of action against a vendor of lands for fraudulent representations as to an incumbrance;¹⁰ and a cause of action to recover back

¹Chamberlain v. Williamson, 2 Maul. & Selw., 408; Nash v. Hamilton, 3 Abb., 35.

²People v. Tioga C. P., 19 Wend., 73.

³Zabriskie v. Smith, 3 Kern., 322; Hyslop v. Randall, 4 Duer, 660; 11 How., 97.

⁴Lamphere v. Hall, 26 How., 509.

⁵Genet v. Howland, 30 How., 360; Robinson v. Weeks, 6 How., 161; McKee v. Judd, 2 Kern., 622; McGuire v. Worden, 3 E. D. Smith,

355. These cases overrule, Thurman v. Wells, 18 Barb., 500.

⁶Smith v. N. Y. & New Haven R. R., 28 Barb., 605; 16 How., 277; Freeman v. Newton, 3 E. D. Smith, 246; Waldron v. Willard, 17 N. Y. R., 466; see contra, Thurman v. Wells, 18 Barb., 500.

⁷Butler v. N. Y. & Erie R. R. Co., 22 Barb., 110.

⁸Grocers' National Bank v. Clark, 32 How., 160.

⁹Gould v. Gould, 36 Barb., 270.

¹⁰Haight v. Hoyt, 19 N. Y. R., 464.

money which the assignor was induced to pay by the false and fraudulent representations of the defendant.¹

12. The attribute of assignability is not confined to causes of action belonging to natural persons, but extends with equal effect to those belonging to artificial persons.² Where a claim is on contract it is not rendered non-assignable because there is fraud in the transaction.³

13. A defendant is not, in general, liable to be twice arrested for the same cause of action; and it is even more clear that he cannot be subjected to an arrest in two actions in different courts of the state for the same cause.⁴ But the rule does not apply where the first arrest was absolutely void by reason of the want of jurisdiction in the court or officer awarding it.⁵ In the latter case it would seem that he must be first discharged from arrest, before the second process is served, for it has been repeatedly held that a defendant illegally arrested cannot be continued in custody under a legal detainer for the same cause.⁶ So, the rule does not apply where the first arrest was made in another state, and such arrest will not preclude an arrest here for the same cause of action and at the suit of the same plaintiff.⁷ But, if the party was arrested and held to bail in the courts of the United States, he cannot be arrested in an action for the same cause in a state court.⁸

14. If the plaintiff, having acted in good faith and without any fault on his part, has been unable to make the first arrest available;⁹ or, if the defendant be discharged by reason of some act for which the plaintiff is not responsi-

¹Byxhie v. Wood, 24 N. Y. R., 607; Sheldon v. Wood, 2 Bosw., 267.

²Grocers' National Bank v. Clark, 32 How., 160.

³Brady v. Bissel, 1 Abb., 76; French v. White, 5 Duer, 254; and see Atwell v. Le Roy, 4 Abb., 438.

⁴Hernandez v. Carnobeli, 4 Duer, 642; 10 How., 433; Schadle v. Chase, 16 How., 414.

⁵Schadle v. Chase, 16 How., 414.

⁶Att'y Gen. v. Cass, 11 Price, 345; Att'y Gen. v. Dorkings, 11 Price, 156; Birch v. Prodder, 1 Bos. & Pul. N. R., 135.

⁷Peck v. Hozier, 14 John., 346.

⁸Hernandez v. Carnobeli, 10 How., 433; 4 Duer, 642.

⁹Wells v. Gurney, 8 Barn. & Cr., 769; Kearney v. King, 1 Chitty, 276.

ble — as an alteration by the sheriff, of the order of arrest without plaintiff's knowledge — the arrest may be renewed.¹ So, if the defendant obtain his discharge by fraud;² or where plaintiff at the solicitation of defendant's wife, allowed him to leave jail to attend to business, he may be rearrested;³ but where a party has been once arrested and discharged for insufficiency in the affidavits, he should not be again arrested in the same action.⁴

15. A non-resident has the same right as a resident to the remedy of arrest and bail, but if he attempts to exercise it under circumstances of seeming oppression, the court will examine more carefully his proceedings.⁵

16. An order staying the plaintiff's proceedings in an action, has reference to the ordinary proceedings, but does not prohibit him from obtaining an order of arrest. Thus, where, after verdict for the plaintiff, in an action for an assault and battery, the defendant obtained an order allowing him thirty days to make a case, and directing that *all proceedings on the part of the plaintiff be stayed in the mean time*, and the plaintiff, while such order was in force, obtained an order of arrest, it was held on a motion to set aside the order, that the plaintiff might obtain such order without violating the order to stay the proceedings.⁶

¹ Hausin v. Barrow, 6 Term. R., 218.

² Cantellon v. Freeman, 2 Dowl. P. C., 2; Olmires v. Delancy, 2 Strange, 1216.

³ Penfold v. Maxwell, 1 Chitty, 275, note.

⁴ Enoch v. Ernst, 21 How., 96.

⁵ Hyer v. Ayres, 2 E. D. Smith, 211.

⁶ Lapeous v. Hart, 9 How., 541.

SECTION II.

WHERE DEFENDANT IS NON-RESIDENT: FOR INJURIES TO
PERSON, CHARACTER OR PROPERTY.

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| <ul style="list-style-type: none"> 1. § 179. Arrest, in what cases. 2. What is essential to justify an arrest under the first subdivision. 3. Actions not arising out of contract. 4.-9. What constitutes a person a non-resident. 10. When defendant is about to remove from the state. 11. For injury to person or character. 12. What are injuries to person. 13. Actions for <i>crim. con.</i>, seduction, beating servant, etc. 14. Actions for limited divorce, on the ground of cruel conduct. | <ul style="list-style-type: none"> 15. For false imprisonment, or malicious prosecution. 16. When granted for assault and battery, etc. 17. For injury to character. 18. For injuring, wrongfully taking, detaining or converting property. 19. For injuring or withholding real property. 20. In an action against an innkeeper. 21. For converting stocks. 22. For converting promissory notes. 23. Property sold conditionally. 24. For fraud in foreign country—females. |
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1. "The defendant may be arrested, as hereinafter prescribed, in the following cases: 1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring or for wrongfully taking, detaining, or converting property. 2. In an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled or fraudulently misapplied, by a public officer or by an attorney, solicitor, or counsellor, or by an officer or agent of a corporation, or banking association, in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office or in a professional employment. 3. In an action to recover the possession of personal property, unjustly detained, where the property or any part thereof has been concealed, removed or disposed of so that it cannot be found or taken by the sheriff, and

with the intent that it should not be so found, or taken, or with the intent to deprive the plaintiff of the benefit thereof. 4. When the defendant has been guilty of a fraud, in contracting the debt or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit. 5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors. But no female shall be arrested in any action, except for a willful injury to person, character, or property.”¹

2. To justify an arrest under the first clause of the first subdivision; three things are essential: An action for the recovery of damages; a cause of action not arising out of contract; and a defendant who is either not a resident of this state, or who is about to remove therefrom.

3. Actions not arising out of contract, are actions that were formerly known as actions for torts; included under the two heads of trespass with force and arms, as assault and battery and false imprisonment; and trespass on the case, where the act is not accompanied with force and violence, and is injurious in its consequences only, as slander, malicious prosecution, trover and the like. Among the actions not arising out of contract, may be enumerated the following: Actions for criminal conversation,² and seduction;³ for a limited divorce on the ground of cruelty;⁴ actions against a common carrier for the loss of goods;⁵ or against an innkeeper for the loss of baggage;⁶ or actions for the fraudulent representation of another's

¹ Code, § 179.

² *Delamater v. Russell*, 4 How., 289.
³ 234; see 4 Bosw., 627.

⁴ *Taylor v. North*, 3 Code, R., 9.

⁵ *McIntosh v. McIntosh*, 12 How.,

289.

⁶ *Buckle v. Ellis*, 4 How., 288.

⁷ *People v. Willette*, 26 Barb., 78,
15 How., 210.

responsibility;¹ but, since the amendment of subdivision four, an arrest on the latter ground will come under the last clause of that subdivision, and non-residence, or intended departure need not be shown.²

4. The question as to what constitutes a person a non-resident will be discussed fully hereafter, under the head of attachments, as most of the decisions bearing on the question have been made in that proceeding. The principles are the same in both cases, and it will be unnecessary here to give any thing more than the general rules, referring to attachments for a more extended consideration.

5. By the term "resident" or "residence," a legal residence is meant; that is, the place of a man's fixed habitation; where his political and social rights and duties are exercised. The words "legal residence," "inhabitaney" and "domicil," are convertible terms.³

6. Every person must have a domicil or *legal residence* somewhere, and he can have only one domicil at one and the same time; every person has a domicil of origin arising from birth or connections, and this he retains until he acquires another. The domicil of a minor follows that of the father and remains until such minor acquires another, which he cannot do until he becomes a person *sui juris*.⁴ The domicil of the wife follows that of the husband, unless they are living separate by decree of a court having jurisdiction.⁵ Where the father is dead, the domicil of the children follows that of the surviving mother.⁶

7. A man's being in a place is *prima facie* evidence that he is domiciled there; but it may be explained and the presumption rebutted.⁷ His mode of living is not mate-

¹ Smith v. Corbiere, 3 Bosw., 634.

² Haslette v. Gill, 19 Abb., 353.

³ Crawford v. Wilson, 4 Barb., 504,
Chaine v. Wilson, 16 How., 552,
Houghton v. Ault., id., 77.

⁴ Crawford v. Wilson, 4 Barb., 504,

⁴ Cow., 516, note.

⁵ Vischer v. Vischer, 12 Barb., 640.

⁶ 4 Cow., 516, note.

⁷ 14 How. (U. S.), 401, 16 John., 128.

rial, whether on rent, at lodgings, or in the house of a friend.¹ There is no fixed period of time necessary to create a domicil. It may be acquired after the shortest tarry under certain circumstances, and under others, the longest tarry may be insufficient.² There must be both the fact of the abode, and the intention of remaining indefinitely. Both must be proved: the first is readily proved by a single fact; the other may be established by the declaration of the party, or his conduct, which is at least as satisfactory evidence as his declaration upon such a question.³

8. Where a person does business in this state, but boards in another state where his family reside;⁴ or where he does business here during the week, boarding at a boarding house, but spends his Sundays with his family, who reside in another state, he is a non-resident.⁵ Where a person has two residences for different seasons of the year, as a city residence and a country residence, that will be his domicil or legal residence, which he himself selects or deems to be his *home*; or which appears to be the center of his affairs; or where he votes and exercises the rights and duties of a citizen.⁶

9. Where a man is temporarily absent from the state, intending to return, he does not become a non-resident;⁷ nor does a temporary sojourn within this state, without intention of settling here, constitute a person a resident.⁸ Absence from the state, in the service of the United States, either in the army or navy, does not render a person a non-resident.⁹

¹ *Parsonsfeld v. Perkins*, 2 Greenl., 411; 4 Cow., 516, note.

² High appellant, 2 Doug. (Mich.) R., 515; *Vischer v. Vischer*, 12 Barb., 640.

³ *Hegeman v. Fox*, 31 Barb., 475; *Vischer v. Vischer*, supra.

⁴ *Barry v. Backover*, 6 Abb., 374; *Beach v. Lawrence*, 17 How., 554.

⁵ *Chaine v. Wilson*, 16 How., 552,

see otherwise, *Turner v. Church*, 2 Abb., 299.

⁶ 27 Miss., 704; *Douglass v. Mayor of N. Y.*, 2 Duer, 110.

⁷ *Hurlbut v. Seeley*, 11 How., 507.

⁸ In the matter of *Fitzgerald*, 2 Caines, 317; *Boardman v. House*, 18 Wend., 512.

⁹ *Tibbetts v. Townsend*, 15 Abb., 221.

10. To justify an arrest on the ground that the defendant is about to remove from the state, it is necessary that it appear to the satisfaction of the judge, that such defendant intends to leave the state permanently, and to take up his domicile elsewhere. A temporary departure for pleasure or business, with intent to return is not sufficient;¹ and it must also appear that he is *about* to remove, or in other words, that he means to remove promptly.²

11. The defendant may also be arrested in an action for an injury to person or character. The *rights* of persons in private life are divided into *absolute*, being such as belong to individuals in a single unconnected state; or *relative*, being those which arise from civil and domestic relations. The absolute rights of individuals may be resolved into the right of personal security, of personal liberty, and the right to acquire and enjoy property.³ The relative rights arise from the relations of husband and wife; parent and child; guardian and ward; and master and servant.⁴

12. Injuries to person are either such as infringe upon the absolute rights, as assault, assault and battery, rape, false imprisonment, etc., or such as infringe upon the relative rights, as criminal conversation, seduction and the like.

13. In an action for criminal conversation with plaintiff's wife, it was held that the defendant might be arrested, it being for an injury to the person of the plaintiff.⁵ So, in an action for the seduction of plaintiff's daughter or servant;⁶ and by the same principle of construction it might be extended to that class of legal injuries arising in the relation of master and servant, parent and child, guardian

¹ Brophy v. Rogers, 7 Leg. Obs., 152.

² 30 English L. & Eq. Rep., 272.

³ 2 Kent, 1.

⁴ 2 Kent, 39.

⁵ Delamater v. Russell, 2 Code R.,

147; 4 How., 234; Straus v. Schwarzwalden, 4 Bosw., 627; Dyott v. Dunn, 2 Chitty, 72.

⁶ Taylor v. North, 3 Code Rep., 9; Carter v. Drake, 10 Wend., 618.

and ward, as to injuries for enticing away the servant, beating or maiming the servant, ward, or child.¹

14. An action for a limited divorce on the ground of cruel and inhuman treatment seems to be an action for injury to the person within this subdivision. But not so, an action for divorce on the ground of adultery. In the latter case the action is founded on the alleged breach of the marriage contract; and is not technically, nor within the normal or legal sense of the term an action for injury to the person. It stands upon a different footing, and contemplates a different result.²

15. In an action for false imprisonment the defendant may be arrested, unless it appear that the facts in the original cause made a reasonable ground for the arrest, and that the damages could only be nominal.³ But where a person has, in good faith, merely stated his case, upon oath or otherwise, to a magistrate having jurisdiction, he is not liable to an action for false imprisonment upon the consequent arrest of the accused, although such arrest was not justified by either the law or the facts in the case.⁴

16. In *Davis v. Scott*,⁵ Mr. Justice Daly held that an order of arrest should not be granted in actions for assault and battery, libel or slander, unless the defendant is a non-resident or transient person; or unless in extreme cases of violent and cruel batteries. But the language of the statute is clear and explicit, and it is doubtful whether it is susceptible of a construction so limited.

17. As a part of the absolute rights of persons, the preservation of every individual's good name from vile arts of detraction, is justly included.⁶ And it is probable

¹ *Delamater v. Russell*, 4 How., 234; *McIntosh v. McIntosh*, 12 How., 289.

² *McIntosh v. McIntosh*, 12 How., 289.

³ *Gordon v. Upham*, 4 E. D. Smith, 9.

⁴ *Von Latham v. Rowan*, 17 Abb., 238.

⁵ 15 Abb., 127.

⁶ 2 Kent, 16.

that, in actions for slander, libel and malicious prosecution, the defendant could have been arrested, even if the words "or character," had not been inserted in this subdivision.¹ In an action for malicious prosecution the facts which are relied upon as evidence of want of probable cause, must be set forth in the affidavits.²

18. The defendant is likewise liable to arrest in an action "for injuring, or for wrongfully taking, detaining, or converting property." These actions answer to the old actions of trespass, case, trespass *de bonis asportatis*, and trover. Cases frequently arise where the plaintiff has his election to proceed either under section 206 of the Code, to recover *possession* of the goods, or to recover damages for the taking, detention or conversion. When he has once made his election, he must abide by it. He cannot commence his action and hold the defendant to bail under this subdivision, and afterwards have the property delivered to him.³

19. The words "wrongfully taking, detaining or converting property," must be construed to apply to personal property exclusively, because the terms are not applicable to real property, which cannot, from its nature, be taken, detained or converted. But it is otherwise as to the term "injuring;" therefore, in an action to recover the possession of real property, *with damages* for the unlawful withholding thereof, the defendant may be arrested.⁴ If, however, the action is brought to recover possession of real property *without damages*,⁵ or for possession and rents and profits simply, it is otherwise, and an order of arrest cannot be had.⁶

20. Nor can the defendant who is a resident be arrested,

¹ Delamater v. Russell, 4 How., 234.

² Vanderpool v. Kissam, 4 Sand., 715.

³ Chappell v. Skinner, 6 How., 398.

⁴ Merrill v. Carpenter, 30 Barb., 67.

⁵ Brush v. Mullen, 12 Abb., 240.

⁶ Fullerton v. Fitzgerald, 18 Barb., 441; 10 How., 37.

under this clause of the subdivision, in an action against an innkeeper, on his common law liability, for negligent loss of the baggage of a guest. The gist of the action is tortious negligence, and to hold the defendant to bail, it must be shown that he is a non-resident, or about to depart from the state.¹

21. Abstracting rail road shares, with coupons attached, and converting them into money,² or abstracting and converting certificates of shares, left with the plaintiff for safe keeping, is such a conversion of property as will render the defendant liable to arrest.³ So, in an action to recover the value of stocks pledged as collateral security for the payment of a usurious loan, the defendant may be held to bail, notwithstanding he was by the terms of the contract authorized to hypothecate such stock, and had hypothecated it before the action was commenced.⁴

22. Where the owner of certain promissory notes agreed to sell them to S, a broker, and delivered them to him without receiving payment, but without agreeing to give credit; and S transferred such notes to L, another broker, who sold them and converted the proceeds; it was held, in an action against both, that both were liable to arrest. It would have been otherwise had L been a *bona fide* holder of the notes.⁵

23. So where the defendant received plaintiff's property under an agreement to return it at a certain time, or to pay to plaintiff a certain sum for its value, and subsequent to the time limited for its return, the defendant paid to plaintiff a part of the stipulated price, and gave his due bill for the balance, and afterwards refused either to pay the due bill, or to return the property, it was held that

¹ People v. Willett, 26 Barb., 78; 6 Abb., 37.

² Northern Railway v. Carpenter, 18 How., 222; 3 Abb., 259.

³ Northern Railway v. Carpenter, 4 Abb., 47.

⁴ Cousland v. Davis, 4 Bosw., 619.

⁵ Robbins v. Seithel, 20 How., 367.

the defendant was liable in an action for the conversion of the property and was properly held to bail therein.¹

24. A defendant may be arrested in an action for the unlawful conversion of property in a foreign country, where the property has been brought into this state.² But the concealment, detention or disposal of a piano is not such an injury to property as would justify the arrest of a female.³

¹ Person v. Civer, 29 How., 432; reversing same case, 28 How., 139; see also Keeler v. Clark, 18 Abb., 154.

² Blason v. Bruno, 21 How., 210; Northern R. R., v. Carpenter, 13 How., 222.

³ Tracy v. Leland, 2 Sandf., 729.

SECTION III.

ARREST FOR FINE; PENALTY; ON PROMISE TO MARRY; OR
FOR FRAUD OF OFFICERS, AGENTS, ETC.

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. Subdivision second of § 179. 2. Females cannot be arrested in actions on promise to marry. 3. Officers of a foreign government. 4. Arrest of attorneys, solicitors and counsellors. 5. For moneys collected out of the state by non-resident attorney. 6. Attorney not liable till after demand. 7. Presumed to have received money in official capacity. 8. Liability of attorney for fraud of partner. 9. An attorney refusing to pay over money guilty of professional misconduct. 10. Arrest of officers or agents of a corporation, etc. | <ol style="list-style-type: none"> 11. Of factor, agent, etc., for money received in a fiduciary capacity. 12. When money is not received in a fiduciary capacity. 13-14. Liability of commission merchants. 15. When agent may be arrested though not guilty of fraud. 16-17. Cases in which agents, etc., are liable to arrest. 18. Cases in which agents, etc., are not liable to arrest. 19. Where party defrauded settles or takes a note. 20. The effect of a judgment. 21. Arrest for misconduct or neglect in office. 22. Arrest of females. |
|---|--|

1. The second subdivision of this section provides that the defendant may be arrested "in an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled or fraudulently misapplied, by a public officer or by an attorney, solicitor, or counsellor, or by an officer or agent of a corporation, or banking association, in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office or in a professional employment." A portion of the subdivision was contained in the Code of 1848, but was changed to its present form in 1849.

2. In an action on a promise to marry brought against a female, the defendant cannot be arrested, since this subdivision is governed by the latter part of subdivision 5, which provides that no female shall be arrested in any

action, except for a willful injury to person, character, or property.¹

3. Whether a public officer of a foreign government could be arrested under this subdivision was for some time a matter of doubt; but it seems finally to be settled that he may be. A foreign government or its duly authorized agents, may sue in the courts of this state, and there are no reasonable grounds for excluding them from all the provisional remedies attending such suit which are available to other creditors.²

4. An attorney, solicitor, or counsellor may be arrested in an action for money received, or property embezzled, or fraudulently misapplied, in the course of his employment as such. But if the money is received in a private capacity and not as an attorney, solicitor, or counsellor, he stands upon the same footing as a private individual, and is not liable to arrest. Where, however, an action is brought against an attorney for moneys received by him, the presumption is that he received it in his official capacity, and it is for him to rebut this presumption and show that it was not so received.³

5. An attorney is not exempted from arrest by the fact that he resides and practices his profession in another state where the money withheld by him was received, upon demands left with him for collection. In such case, the defendant cannot set up, to shield him from arrest. The law of the state where he resides or where the business was transacted for the *lex loci contractus* governs only the right and not the remedy by which that right is enforced.⁴

6. In general, an attorney is not liable to an action for money collected by him, until after a demand or instruc-

¹ Shief v. Tuppey, 3 Code, R., 23.

² See Peel v. Elliott, 16 How., 481; Mexico v. Arrangois, 11 How., 1, 576.

³ See Smedes v. Elmendorf, 3 John., 185.

⁴ Yates v. Blodgett, 8 How., 278.

tions to remit;¹ but he may waive the right to a demand, and where an attorney in correspondence with his client denied his liability, and set up a claim against his client to a larger amount, it was held to be a waiver of a demand.²

7. Where a counsel receives money in an action, and pays it over to his attorney, after notice from the client not to pay it over, he will be liable.³ In an action against an attorney for money received by him, the presumption is that it was received in his official capacity, and the burden is on him to rebut such presumption.⁴ And where an attorney receives money to invest on bond and mortgage, but retains the money, and it appears that he would not have been employed, had he not been an attorney, he is liable to be summarily required on motion to pay it.⁵ So, when an attorney receives money to be applied to a specific purpose, and before it is thus applied, the principal demands it back, but the attorney refuses to return it, being under the impression that he cannot do so in justice to a third person, he may be arrested although guilty of no fraud, or intentional breach of trust.⁶

8. If one of two attorneys, who are partners, receives money collected for a client of the firm and embezzles or absconds with it, the other partner will be liable to an action for the money. Each is responsible for the acts of the other within the scope of the partnership.⁷ But, whether he could be held to bail is doubtful. Though the latter decisions are, that, in a mercantile partnership, all the partners may be held to bail for the fraudulent acts of

¹ *Stafford v. Richardson*, 15 Wend., 302; see 7 Wend., 320.

² *Waldrat v. Meynard*, 3 Barb., 584; see 7 Wend., 320.

³ *Matter of Bleakley*, 5 Paige, 311.

⁴ See *Smedes v. Elmendorf*, 3 John., 185.

⁵ *Grant's case*, 8 Abb., 357.

⁶ *Schadle v. Chase*, 16 How., 413; *Gross v. Graves*, 19 Abb., 95.

⁷ *McFarland v. Crary*, 6 Wend., 297; *Warner v. Griswold*, 8 Wend., 605.

one of them in purchasing goods for the use of the firm.¹ A principal, however, is not liable to arrest for the fraud of his agent, provided he does not participate in or ratify it.²

9. When an attorney refuses to pay over money collected by him in his professional capacity, he is guilty of professional misconduct; and it is not so much a breach of contract, as a violation or neglect of professional duty, since he is bound to pay over the money as a professional duty imposed upon him, and which the court may enforce by attachment.³

10. An officer or agent of a corporation or banking association is also liable to arrest in an action against him for money received, or property embezzled, or fraudulently misapplied in the course of his employment, as such, or in a fiduciary capacity. But the liability of an officer or agent to arrest does not result from the fact that his liability in the action arises from his agency; he must be the officer or agent of a corporation or banking association, and the action must be against him for money received, or property embezzled or fraudulently misapplied in the course of his employment as such; or it must be for money received by him in a fiduciary capacity.⁴ In an action for damages sustained by a stockholder of a corporation, against directors and officers, for their fraudulent acts in disposing of the corporate property, the defendants may be held to bail.⁵

11. So any factor, agent, broker, or other person may be arrested for money received in a fiduciary capacity. The term "fiduciary" involves the idea of trust and confidence. It refers to the integrity and fidelity of the party trusted, rather than to his credit or ability to pay, and contemplates good faith, rather than legal obligation

¹ *Coman v. Allen*, 21 How., 114;
Townsend v. Bogart, 11 Abb., 355;
9 Abb., 58.

² *Clafin v. Frank*, 8 Abb., 410.

³ *Stage v. Stevens*, 1 Denio, 267.

⁴ *Stoll v. King*, 8 How., 298.

⁵ *Crook v. Jewett*, 12 How., 19.

as the basis of the transaction. Thus, where an agent is employed to collect money, he acts under a special trust; the money he receives is not his own, but he is bound to pay it over in specie to his principal, and he acts in a fiduciary capacity.¹ The true criterion as to whether or not a person is acting in a fiduciary capacity is to determine whether the specific money received ought in good faith to have been kept and paid over to the principal; or whether the defendant, upon receiving such money, had the right to use it as his own, holding himself accountable to his principal for the debt thus created.²

12. A person cannot be said to have acted in a fiduciary capacity who receives money upon an agreement that he may use it for his own purposes in his own business, and hold himself responsible to his principal for the amount. Thus, where the defendant was consignee and agent of a ship owned by the plaintiff, which was sold and the proceeds received by the defendant, and it was the duty of such consignee to take general charge of the ship, pay all expenses relating to her, sell her, pay all expenses of sale, and account to the plaintiff, not for the whole balance of proceeds, less his commissions, but for the balance due on general account, it was held, that he was trusted as a debtor, rather than as an agent in a fiduciary capacity, and was not liable to arrest for not paying over all the proceeds of the ship.³

13. The term "fiduciary capacity" tends to show what is meant by factor, agent, or broker; that is, one in whom trust is reposed — such as is usually reposed in those persons in their ordinary and regular business — or, in other words, a trust that they will sell and immediately remit the amount of proceeds after deducting their commissions. But factors⁴ or commission merchants, doing

¹ Stoll v. King, 8 How., 298.

² Id.

³ Goodrich v. Dunbar, 17 Barb., 644.

⁴ Id.

business in the ordinary way, that is, receiving property from the consignors from time to time, paying the freight and charges thereon, and making sales and collections in their own names, placing the proceeds to their own credit in their bank account, charging their commissions and payments made on account of the property, and making remittances to, and accepting and paying drafts of the consignors, do not act in a fiduciary capacity, and are not liable to arrest.¹

14. Thus, where the plaintiffs made several consignments of flour to the defendants, who were commission merchants doing business in Albany, and the defendants paid the freight and charges and opened an account with the plaintiffs, and made sales of the flour from time to time, charging their commissions and payments made on account of the flour, and crediting the proceeds of sales. They made remittances to the plaintiff, and the plaintiff drew upon them, in one instance at thirty days. They were doing a large commission business, made the sales and collections in their own names, and placed the proceeds of all sales to their own credit at the bank. It was held that the defendants were not acting in a fiduciary capacity, but that the relation between the parties was that of debtor and creditor.² The case of *Schudder v. Shiells*,³ which holds that a commission merchant, receiving butter to sell on commission, acts in a fiduciary capacity, is referred to in the above decision, and the judge says: "This case (*Schudder v. Shiells*), I think can only be sustained upon the understanding that the plaintiff made the defendant (a commission merchant in New York), his agent specially to sell the butter, and to remit to the plaintiff the money received for it." "It does not appear in the case that

¹ *Duguid v. Edwards*, 32 How., 254; but see *Ostell v. Brough*, 24 How., 274.

² *Duguid v. Edwards*, 32 How., 254.

³ 17 How., 420.

there was more than one shipment of butter, and it does not appear that the defendant paid the freight or any charges, or was at any expense on account of the butter." The case of *Ostell v. Brough* was not referred to. In the latter case the plaintiff was a lumber dealer in Montreal, and consigned lumber to the defendant at West Troy, to be by him sold on commission — such commission being eight per cent, which included a premium for guarantying sales — and to account for the net proceeds after deducting charges and commissions. It was held that the defendant was acting in a fiduciary capacity, and for any failure to remit proceeds could be arrested.¹

15. To render an agent, receiving money in a fiduciary capacity, liable to arrest, it is not essential that he be guilty of fraud or an intentional breach of trust. So, that when an agent receives money for a specific purpose, but before it is applied to that purpose and while it is in such agent's hands, the principal demands its return to him, but the agent refuses to return it, under the impression that he cannot do so in justice to a third party; he is, nevertheless, liable to arrest.² So where an agent withholds money from his principal, under the belief that by paying it over he would render himself liable to a third party, who has interposed a claim to such money; he is not thereby exempted from arrest.³

16. An agent employed to collect money for his principal; ⁴ a factor receiving money to invest in certain goods, or for a specific purpose; ⁵ an agent employed to sell goods and account weekly; ⁶ a person receiving money from another to pay to a third person; ⁷ one employed to sell goods as a pedler and return to the plaintiff the pro-

¹ 24 How., 274.

² *Schadle v. Chase*, 16 How., 413. 139.

³ *Gross v. Graves*, 19 Abb., 95.

⁴ *Stoll v. King*, 8 How., 298.

⁵ *Noble v. Prescott*, 4 E. D. Smith,

139.

⁶ *Turner v. Thompson*, 2 Abb., 444.

⁷ *Burhaus v. Casey*, 4 Sandf., 706.

ceeds of the goods sold, with any goods not sold;¹ an individual receiving property to be delivered to others, and to receive the pay therefor;² an auctioneer receiving goods to sell at auction under an agreement that he shall have all over a certain sum for his services;³ a stock broker receiving money for the express purpose of purchasing certain stocks;⁴ the surety on a lease entrusted with money to pay the rent;⁵ and a broker employed to sell exchange on a foreign country, at a certain rate over and above his commissions;⁶ act in a fiduciary capacity, and are liable to arrest for any failure to account, or for a misappropriation of the proceeds.

17. So the clerk of a corporation, abstracting and converting its shares, whether belonging to, or deposited with, such corporation;⁷ or a party with whom stock is pledged as collateral security for a usurious loan, and who refuses to return such stock on demand, may be arrested and held to bail.⁸ So, where the agent of the plaintiff deposited money in the bank to the credit of the defendants, a firm, without their knowledge, and the plaintiff afterwards wrote them to remit the money by draft, and they remitted instead of the draft, a bill of exchange on a branch of their house, payable at sixty days sight, which the plaintiff refused to accept, the defendants failing before maturity and leaving the bill unpaid, it was held that the defendant, one of the copartners, was liable to arrest in an action against the firm to recover the money.⁹

18. But it is only when they act in a fiduciary capacity, that factors, agents and brokers are liable to arrest.

¹ Redder v. Whitlock, 12 How., 209.

² Frost v. McCarger, 14 How., 131.

³ Holbrook v. Horner, 6 How., 86; see contra, Commonwealth v. Stearns, 2 Met. R., 343.

⁴ Dubois v. Thompson, 25 How., 417.

⁵ Burhaus v. Casey, 4 Sandf., 706.

⁶ Barritt v. Gracie, 34 Barb., 20.

⁷ N. Railway v. Carpenter, 4 Abb., 47; 13 How., 222.

⁸ Cousland v. Davis, 4 Bosw., 619.

⁹ Bull v. Melliss, 9 Abb., 58; fully stated 1 Til. & Sher. Pr., 562.

Where the nature of their engagement is such as to imply a credit, or a legal responsibility to their principal, as for a balance of account, the relation of debtor and creditor exists between them and such principal, and they cannot be held to bail. Thus, where the defendants received goods from R upon conditions of making an advance to him thereon, and consigning the goods to a responsible foreign house for sales and returns, and agreed to pay to R any surplus over the advance, R agreeing to make good any deficiency if the returns fell below the advance, and the defendant thereupon consigned the goods to the plaintiff, inclosing R's instructions as to sales, and drew on the consignees for about the amount of their advance to R and their draft was paid. After the sales, there proving to be a deficiency, the defendant collected a part of such deficiency from R, but failed to pay it over to the plaintiff. It was held that the defendants were not acting in a fiduciary capacity.¹ So, where the defendant, a banker, was employed by the plaintiffs as such to receive their deposits, collect their bills and credit the amount, with the agreement that he might use the money, paying drafts on him when presented and allowing interest on balance at five per cent. And on the 15th of August defendant received from plaintiff a draft for \$4,000, to be collected and passed to their credit, payable the 25th of same month. On the 24th the defendant knew that he was insolvent, collected the draft on the 25th, and afterward and on the same day suspended. It was held that the money was not received by the defendant in a fiduciary capacity; that he did not wrongfully convert the property of the plaintiff and that he was not guilty of a fraud in contracting the debt for which the action was brought, nor in disposing of the property, the pro-

¹ *Angus v. Dunscomb*, 8 How., 14.

ceeds of the draft.¹ So, where the defendant was agent and consignee of a ship owned by the plaintiffs, whose duty it was to take a general charge of the ship, pay all expenses relating to her, sell her and pay the expenses of sale, and account to the plaintiffs for the balance due on general account. The defendant having sold the ship and retained the proceeds, and an order of arrest having been obtained against him, the same was vacated by the general term.²

19. Where one is liable to arrest for money received in a fiduciary capacity, and the principal takes the note or check of the agent for such liability, and the note or check is dishonored, it is no bar to an arrest in an action on the original liability, if a return of the note has been made or offered. But, if the action is brought on the check or note, it is otherwise, and the defendant cannot be held to bail.³ Where a party has been defrauded and, with full knowledge of the fraud, settles the matter in relation to which the fraud has been committed, he has no claim to relief at law or in equity on account of such fraud.⁴

20. The recovery of judgment in the courts of this state, merges the cause of action, and in an action on such judgment the defendant cannot be held to bail, even though he might have been for the original liability. So, also of the recovery of judgment in the courts of any other state of the union.⁵ But the judgment of a sister state can have no greater effect here, than belongs to it in

¹ *Bussing v. Thompson*, 15 How., 97; 6 Duer, 696.

² *Goodrich v. Dunbar*, 17 Barb., 644.

³ *Shipman v. Shafer*, 14 Abb., 449; *Merchants' Bank v. Dwight*, 13 How., 366; *Harding v. Shannon*,

20 How., 25; see otherwise, *Alliance Ins. Co. v. Cleveland*, 14 How., 408.

⁴ *Adams v. Sage*, 28 N. Y. R., 108.

⁵ *Mallory v. Leach*, 14 Abb., 449, note; *Goodrich v. Dunbar*, 17 Barb., 644; *Suydam v. Barber*, 18 N. Y. R., 468.

the state where it was rendered.¹ The rule is otherwise with a *foreign* judgment ; such judgment is not conclusive between the parties, and the plaintiff has his election to sue either upon the judgment or upon the original cause of action.² So, a preliminary inquisition on an English *extent*, though made by a jury and placed on record in the court of exchequer, has not, being purely an *ex parte* proceeding, the effect of merging the original cause of action or of depriving the plaintiff of a provisional remedy incident to that cause in an action brought in this state. A record to have that effect must be the result of the proceeding of a court in which jurisdiction has been acquired of the person of the defendant.³

21. The defendant may likewise be arrested in an action for any misconduct or neglect in office, or in a professional employment. An attorney embezzling or misapplying money collected for his client is guilty of misconduct in a professional employment.⁴

22. A female cannot be arrested under this subdivision since it is governed by the latter part of subdivision five, which provides that no female shall be arrested in any action except for a willful injury to person, character or property.

¹ *Suydam v. Barber*, 18 N. Y. R., 468.

² *Arthurton v. Dalley*, 20 How., 311.

³ *Peel v. Elliott*, 16 How., 481.

⁴ *Stage v. Stevens*, 1 Denio, 267.

SECTION IV.

IN ACTIONS TO RECOVER PERSONAL PROPERTY.

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| 1. For concealing, removing or disposing of property. | 4. What must be shown on the application for the order. |
| 2. Action must be for recovery of property in specie. | 5. Intent, how charged. |
| 3. Plaintiff cannot have both arrest and delivery of property. | 6. Where property was disposed of before suit brought. |
| | 7. Arrest of females for — |
| | 8. Form of the order. |

1. The third subdivision of the section provides that the defendant may be arrested: "In an action to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed, or disposed of so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof." The subdivision was settled at its present form in 1849, except the latter clause as to the *intent* which was added in 1851.

2. In order to procure the arrest of the defendant under this subdivision, the action must be for a recovery of the property in specie, and not an action for damages for the wrongful conversion or detention of property. In the ordinary case for converting property, or detaining it in hostility to the claims of the true owner, the order of arrest must be under the first subdivision, which is satisfied with bail that the defendant shall render himself amenable to the process and judgment of the court. Whereas an arrest under this subdivision can be superseded only by an undertaking to deliver the property to the

plaintiff, if such delivery be adjudged, and to pay any judgment that may be recovered.¹

3. The plaintiff has his election to proceed to recover possession of the property as provided by section 206, or to recover damages for the taking or detention thereof; and having once made his election, he must abide by it. He cannot have the defendant arrested and have a delivery of the property too, pending the litigation. If he elects to proceed under this subdivision, and has the defendant arrested, he cannot afterwards obtain possession of the property while the action is pending.² The relief demanded in the pleadings will determine the character of the action, and if the relief demanded is only a certain amount for damages, an arrest cannot be had under this provision, although it may under subdivision first.³ The relief demanded should be the possession of the specific property, or the value thereof, in case a delivery cannot be had, and of damages for the detention.⁴

4. It was formerly held that the defendant was liable to arrest if the property had been removed, however innocently, so that it could not be found by the sheriff;⁵ but it is now well settled otherwise, both by the courts and legislative enactment.⁶ As the law now stands, it must appear to the judge to whom the application is made, that an attempt has been made by the sheriff to take the property; that it has been removed, concealed or disposed of so that it cannot be found or taken by the sheriff, and with the *intent* that it should not be so found or taken, or with the *intent* to deprive the plaintiff of the benefit

¹ Code, §§ 187, 211; Seymour v. Van Curen, 18 How., 94.

² Chappell v. Skinner, 6 How., 338.

³ Seymour v. Van Curen, 18 How., 94; see Elston v. Potter, 9 Bosw., 631.

⁴ § 277.

⁵ Van Neste v. Connover, 5 How., 148.

⁶ See § 179, sub 3, as amended in 1851, cited above; Roberts v. Randall, 5 How., 327; Pike v. Lent, 4 Sandf., 650.

thereof.¹ The attempt of the sheriff to take the property and the fact of its removal, etc., may be proved by the sheriff's certificate or return. But the officer will very rarely be able to certify as to the intent. That must be shown by *facts* set forth in the affidavit upon which the application for an order of arrest is founded. The mere belief of the party or sheriff that the property has been removed, concealed, or disposed with the intent above stated, will not be sufficient; but the facts upon which the belief is founded should be fully set forth.

5. It will undoubtedly be proper to charge the intent in the alternative; that is, to allege that the property was removed, etc., with the intent that it should not be found or taken by the sheriff, *or* with the intent to deprive the plaintiff of the benefit thereof. In an attachment suit it was held that where there may be one of two several intents coupled with an act, and an attachment is issued on an affidavit alleging the act with one of these intents, it will be sustained by proof of the other intent; as where an attachment was granted upon affidavits alleging departure from the state with intent to defraud creditors, the attachment was sustained by proving the departure with intent to avoid the service of a summons,² and from the obvious analogy between the two proceedings, the same rule should be equally applicable to cases under this section.

6. The action for the recovery of the possession of specific property can be maintained, even though the defendant has wrongfully parted with the possession of such property before the suit was brought, or even before it was apprehended.³ The decisions to the contrary have all been overruled. But to authorize an arrest in the action,

¹ *Mulvey v. Davison*, 8 How., 111; 309; *Ward v. Woodburn*, 27 Barb., 346; *Nichols v. Michael*, 28 N. Y.

² *Morgan v. Avery*, 7 Barb., 656.

³ *Brockway v. Burnap*, 16 Barb., 416.

R., 264; *Ross v. Cassidy*, 27 How.,

if the disposition or removal took place before suit brought, it must be shown to have been done to render ineffectual the proceedings in the suit, which the defendant knew, or had reason to apprehend, the plaintiff intended to bring to recover the possession of the property.¹ The ground of the arrest is not simply the removal or concealment of the property, but such removal or concealment, coupled with a fraudulent intent. So, that if the defendant has parted with the possession in the usual course of business before suit brought, he cannot be held to bail.²

7. It is not probable that a female can be arrested under this subdivision, although in one of the earlier cases it was held otherwise.³ The word "property," as used in this subdivision, does not mean plaintiff's interest or estate; and a concealment or removal of property is not a willful injury to property.⁴ But where a female had disposed of property and converted the proceeds, it was held that she could be held to bail.⁵

8. The order of arrest granted in an action to recover the possession of specific personal property, should conform in its recital to the recital in the complaint. An order in such case reciting that the cause of action is a detainer or conversion, and requiring the sheriff to hold the defendant to bail in a specific sum, is unauthorized. The ground of the arrest is the concealment, removal or disposition of the property with a fraudulent intent, and the order must require an undertaking as provided by section 211.⁶

¹ Mulvey v. Davison, 8 How., 111 ;
Pike v. Lent, 4 Sandf., 650.

² Pike v. Lent, *supra*.

³ Starr v. Kent, 2 Code R., 80.

⁴ Tracy v. Leland, 2 Sandf., 729.

⁵ Northern R.R. v. Carpenter, 13
How., 222 ; 3 Abb., 259.

⁶ Elston v. Potter, 9 Bosw., 631.

SECTION V.

FRAUD IN CONTRACTING DEBTS, ETC.

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| <ol style="list-style-type: none"> 1. For fraud in contracting a debt. 2. Fraud not to be alleged in the complaint. 3. Definition of words "<i>debt</i>" and "obligation." 4. Purchaser not bound to reveal his insolvency. 5. Unless he has made assignment, etc. 6. Where purchaser buys goods with intent not to pay for them. 7. Purchaser held to intend the legitimate consequences of his acts. 8. Actual intent to be proved — when may show similar frauds. 9. As to duty of vendor in making inquiries. 10. Various cases of fraudulent representations. 11. When fraudulent representations were made in foreign country. | <ol style="list-style-type: none"> 12. Fraud must be personal; when principal liable for fraud of agent. 13. When all the partners can be arrested for fraud of one. 14. In actions for <i>fraud</i> or <i>deceit</i>. 15. What is <i>fraud</i> or <i>deceit</i>. 16. Falsely representing a third party as responsible. 17. Fraudulent representations in the sale of land, etc. 18. What representations are not fraudulent. 19. Agent contracting without authority. 20. The effect of taking a note or security for the debt. 21. Of a settlement after knowledge of fraud. 22. Of a judgment for the debt contracted in fraud. 23. Females not arrestable for fraud. |
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1. "Where the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property, for the taking, detention or conversion of which the action is brought; or where the action is brought to recover damages for fraud or deceit,"¹ the defendant may be arrested. The last clause of this subdivision was added in 1863.

2. The grounds on which the order of arrest is sought, under the first clause of this subdivision, should not be set forth in the complaint. The action must be on the debt or obligation, and the right to the order depends upon facts extrinsic to the cause of action, and which are not

¹ Code, § 179, sub 4.

identical with or inherent in the cause of action itself. Those facts should only be set forth in the affidavits or other papers relied upon to procure the order of arrest. Fraud is not the gist of the cause of action, although it is of the cause of arrest.¹

3. The words "debt" and "obligation" in this connection imply a liability arising upon contract. "Debt" implies a fixed and absolute liability, a sum actually due from one person to another; while "obligation" includes an inchoate and conditional liability whose fixed character is to be determined by subsequent events. The section obviously contemplates a debt or obligation arising *ex contractu* on which an action will lie whether contracted or incurred with or without fraud. It has no relation to a cause of action arising wholly out of fraud of the party and which must fail if the fraud is not proved. But the defendant can be held to bail in the action only when he has been guilty of fraud.²

4. The law does not in ordinary cases impose upon the purchaser the duty of disclosing to the seller the state of his pecuniary circumstances, no matter how desperate they may be; and the rule is the same notwithstanding the fact that there has been a long course of dealing between the parties, and the insolvency of the purchaser has occurred during such dealing. Therefore, although a purchaser at the time of making a purchase from one with whom he has been in the habit of dealing, is insolvent and knows himself to be so, and intentionally conceals it from the vendor, by simply withholding his knowledge on the subject, and he still retains the possession of property and is

¹ McGovern v. Payne, 32 Barb., 83; see also, Crandall v. Bryan, 15 How., 48; Smith v. Knapp, 3 N. Y. R., 581.

² McGovern v. Payne, 32 Barb., 83; Smith v. Corbiere, 3 Bosw., 634; see, however, Crandall v. Bryan, 15 How., 48.

pursuing his business as before, he is not thereby guilty of a fraud that would justify his arrest.¹

5. But, if the purchaser says any thing or does any thing to mislead, or resorts to any artifice to conceal his circumstances it is otherwise. So, if at the time of making the purchase he is not only insolvent, but has performed an open and notorious act of insolvency, by breaking up his business and assigning his property for the benefit of his creditors, it is his duty, arising out of his previous dealings with the vendor, to communicate that fact to the vendor, before the sale; and the violation of that duty amounts to a fraud.²

6. So, also, if the purchaser conceal the fact of his insolvency with the design of procuring the goods and not paying for them, it will be a fraud that will render the sale void, and the purchaser liable to arrest.³ And the design or intent will be inferred, from the purchaser's acts, taken altogether, although denied by him under oath.⁴

7. A purchaser who obtains goods by false representations, must be held to *intend* the legitimate consequences of his acts; and it will be unavailing for him to say that he did not mean at the time to defraud the plaintiff.⁵ It must be shown, however, that he knew that the representations were false; for if he believed them to be true at the time he made them, he was not guilty of any fraud, however false in fact they may have been.⁶

8. In all cases where fraud is charged, proof of actual intent ought to be required to justify an order of arrest. Fraud cannot be presumed in the absence of all evidence

¹ Mitchell v. Worden, 20 Barb., 253; Hall v. Naylor, 18 N. Y. R., 588; 24 id., 139; McDonald v. Christie, 42 Barb., 36.

² Id.

³ Hall v. Naylor, 18 N. Y. R., 588; 24 id., 139; 28 id., 486; Mitchell v. Worden, 20 Barb., 253.

⁴ Morrison v. Garner, 7 Abb., 425.

⁵ Whitcomb v. Salsman, 16 How., 533.

⁶ Gaffney v. Burton, 12 How., 516; 28 Barb., 293.

on the subject. The deduction of fraud may be made, not only from deceptive assertions, but from facts, incidents and circumstances connected with the transaction and the parties to it. Where there is no overt act of fraud, resort is had to the various incidents and circumstances which are calculated to exhibit the hidden purpose of the actor's mind. It is therefore competent to show that the party accused was engaged in other similar frauds at or about the same time; but the transactions must be so connected in point of time and so similar in their character and other relations that the same motive may be reasonably imputed to them all.¹

9. In case of fraud it is always implied that the injured party has been deceived; that he did in fact rely upon the fraudulent statements of the defendant; otherwise it was his own fault or folly, and he cannot ask the law to relieve him. And some of the cases go farther still and hold that where the plaintiff could readily have informed himself of the truth by making inquiries and neglected so to do he is remediless.² Where a party has full knowledge of the entire transaction which he alleges to be a fraud upon him, or where it appears that he had such knowledge as ought to have put him on inquiry, especially where such inquiry might have been readily and easily made, it may be just and wise to hold that there is no fraud. But such cases extend the rule quite far enough. There ought to be such a thing as a right to confide in the statements of other persons, when deliberately made in business transactions; and it has been recently held that every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party but unknown to

¹ Hall v. Naylor, 28 N. Y. R., 486, 18 N. Y. R., 588; see also Hathorne v. Hodges, 28 N. Y. R., 486.

² 2 Parsons on Contracts, 270; White v. Seaver, 25 Barb., 236; 28 N. Y. R., 110.

him, as the basis of a mutual agreement; and that such contracting party is under no obligation to investigate or verify statements, to the truth of which, the other party to the contract, with full means of knowledge, has deliberately pledged his faith.¹

10. Where a defendant represents himself to be good and responsible for the purchase price of goods, and that he has certain property of a value sufficient to pay for any goods he may buy, and shortly after, without any change in his circumstances having taken place, makes an assignment for the benefit of creditors, which assignment shows a deficiency of near fifty per cent, the inference of fraud is clear.² So, if the purchaser, knowing himself to be insolvent, assures the seller that he is good and able to pay all that he contracts to pay, and the seller, relying on such representations, sells him goods, he is guilty of a fraud.³ It is not indispensable that representations should have been made by the purchaser; it is enough that the goods were obtained with the fraudulent intent not to pay for them, and under circumstances that deceived, and which it was designed should deceive the vendor and induce him to part with the possession of the goods.⁴ Where the defendant obtained a large credit by representing himself to be doing a prosperous business and as being able to meet all engagements he might make, and shortly after, suspended business and stopped payment, and fled from his creditors and home; but refused to disclose the cause of his sudden embarrassment and change of fortune; it was held to be strong if not conclusive evidence of fraud, notwithstanding a denial on his part of any fraudulent intent.⁵ So, where a defendant borrows money on a promise to apply it to a particular use, but

¹ Mead v. Bunn, 32 N. Y. R., 275.

² Scudder v. Barnes, 16 How., 534.

³ Freeman v. Leland, 2 Abb., 479.

⁴ King v. Philips, 8 Bosw., 603.

⁵ City Bank v. Lumley, 28 How., 397.

applies it to another use, he is liable to arrest for fraud in contracting the debt.¹

11. A defendant may be arrested in a civil action here for fraudulent representations made in the purchase of property in a foreign country, of a foreign creditor, where such property, or its proceeds, are brought here by him, although he could not have been arrested for such act in the country where the goods were purchased. The *lex fori* and not the *lex loci* governs in such cases.² But our courts have no jurisdiction of an action of tort brought by a citizen of one foreign state against a citizen of another foreign state for alleged injuries committed in one or both of those states.³

12. To authorize an arrest the fraud must be personal; and therefore a principal cannot be held to bail for the fraud of his agent, though committed for his benefit, unless he participate in such fraud, or knowingly ratify it.⁴ Nor can a husband be arrested for the fraud of his wife.⁵ So, where a husband contracted a debt, on the faith of a specific appropriation of money, part of his wife's separate estate, to the payment, but which she afterwards countermanded, he was not subject to arrest.⁶

13. Whether copartners can be arrested in cases where goods have been obtained upon fraudulent representations by one of the copartners, has been the subject of much difference of opinion and decision. The later cases, however, hold that where the goods for which the debt was fraudulently contracted, are purchased for the use of the firm, and are received and used by the firm, all the members of the co-partnership are liable to arrest, al-

¹ Lovell v. Martin, 11 Abb., 126.

Abb., 165; Smith v. Ball, 17 Wend., 323.

² City Bank v. Lumley, 28 How., 397.

⁴ Claffin v. Frank, 8 Abb., 412.

³ Latourette v. Clark, 30 How., 242; see Mussina v. Belden, 6

⁵ Anon., 1 Duer, 613; 8 How., 134.
⁶ Isaacs v. Gorham, 1 Hilton, 479.

though part of them were ignorant of the fraud.¹ Where goods are obtained for the use of a firm, by means of fraud of one of its members, the other partners by receiving and participating in the use of the goods, will be held to have adopted the fraudulent act of the one who obtained them, and will be placed in the same condition in reference to the rights of the vendor of the goods, as if he had directed his partner to procure the property or had concurred with him in the transaction.² But a deceit practiced by one of several joint debtors, in inducing the creditor to accept his check, post dated and indorsed by the other, is not a ground for authorizing his arrest in an action on the check against both.³

14. As has been before stated, the first clause of this subdivision applies only to actions brought to enforce a contract liability; hence until the addition of the last clause in 1863, the defendant could not be held to bail in an action for fraud or deceit, unless he was a non-resident of the state, or about to remove therefrom. But as the Code now stands, where fraud or deceit is the gist of the action the defendant may be held to bail under the latter clause of this subdivision.

15. Fraud which is actionable in a court of justice, consists either in intentional misrepresentations or concealment as to the existence or non-existence of some fact or circumstance.⁴ Fraud coupled with damages entitles the injured party to relief.⁵ It must now be regarded as settled that if a party makes representations in such manner as to import a knowledge in him of the facts, whilst,

¹ *Coman v. Allen*, 21 How., 114; *Townsend v. Bogart*, 11 Abb., 355; *Bull v. Meliss*, 9 Abb., 58; and see *Sharp v. Mayor of N. Y.*, 40 Barb., 257; but see contra, *Hanover Co. v. Shelden*, 9 Abb., 240; *Bull v. Meliss*, 9 Abb., 58 note.

² *Hawkins v. Appleby*, 2 Sand., 421.

³ *Woodruff v. Valentine*, 19 Abb., 93.

⁴ *Farrington v. Bullard*, 40 Barb., 512; *Willink v. Vanderveer*, 1 Barb., 599.

⁵ *Bacon v. Bronson*, 7 John. Ch., 194.

in reality, he has no knowledge of such facts, and the representations are made with the intent that another shall rely on them, and that other does rely on them, and those representations turn out to be false, it is as much a fraud as if the party making them knew them to be untrue.¹

16. In an action to recover damages for false and fraudulent representations respecting the pecuniary responsibility of third persons, the defendant is liable to arrest upon proof of the cause of action merely, without proof of non-residence or intent to depart.²

17. It was held, prior to the addition of the last clause, that fraudulent representations in the sale of land were grounds of arrest under the first clause of this subdivision;³ but since the amendment, an arrest in such case would clearly come under the latter clause. So, false representations by a mortgagee relative to the contents of the mortgage, is a ground of relief, notwithstanding the mortgage is on record; and the fact that the defrauded party had means of ascertaining the truth of the representations, or that the circumstances gave him *constructive* notice that they were false, will be no answer in an action for the fraud.⁴ Every contracting party has an absolute right to rely on the express statements of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.⁵

18. The vendor of an article which has a secret defect unknown to him, such as dry-rot in the timbers of a ves-

¹ Sharp v. Mayor of N. Y., 40 Barb., 256; 25 How., 389.

² Hazlett v. Gill, 19 Abb., 353; the case of Smith v. Corbiere, 3 Bosw., 634, to the contrary was

decided before the amendment of 1863.

³ Crandall v. Bryan, 5 Abb., 164.

⁴ Mead v. Bunn., 32 N. Y. R., 275.

⁵ Id.

sel, is not liable for fraud in representing the thing to be sound. If the seller is ignorant of any unsoundness or other defect in the article sold, a mere representation of soundness will not render him liable. To render the vendor accountable under such circumstances, he must be required to warrant the thing sound, or free from defect.¹ A seller of goods is not bound to answer as to quality or goodness of the article sold unless he expressly warrants the goods to be sound and good; or unless he makes fraudulent representations, or uses some fraudulent concealment concerning them, and which amounts to a warranty in law.²

19. Whenever a person enters into a contract as agent for another, he warrants his own authority, unless very special circumstances, or express agreement relieve him from that responsibility. If he contracts as such agent without authority from the principal, the party contracted with on learning the fact, has the right to repudiate the contract, and to hold the assumed agent immediately responsible for damages; and he may have an action for the deceit.³

20. Where one has been guilty of a fraud in contracting a debt or incurring an obligation, and the creditor or obligee takes the note or check of the party practicing the fraud, and the note or check is dishonored, it is no bar to an arrest in an action on the original liability, if a return of the note has been made or offered.⁴ Thus where the defendant purchased beef cattle and agreed to pay cash for them on delivery; and while the plaintiff and defendant were consulting as to payment, the defendant's agent drove off the cattle and had them slaugh-

¹ Brainard v. Spring, 42 Barb., 470; see McDonald v. Christie, Id., 36.

² 2 Kent Com., 643.

³ White v. Madison, 26 How., 481.

⁴ Shipman v. Shafer, 14 Abb., 449; Merchants Bank v. Dwight, 13 How., 366; see otherwise Alliance Ins. Co. v. Cleaveland, 14 How., 408.

tered the same day; and the defendant thereupon induced the plaintiff to accept a draft, assuring him that it would be honored at sight; but which was dishonored and valueless: and arrest for the original fraud was sustained.¹ Nor does the acceptance by the creditor of bonds, merely as security for the demand, and which are inadequate security, preclude the arrest.²

21. But if a debt or obligation contracted in fraud is settled, with full knowledge of the fraud by a new contract the defendant cannot be held to bail in an action upon such new contract, by reason of the original fraud. So, where a party has been defrauded and with full knowledge of the fraud settles the matter in relation to which the fraud has been committed by a new contract upon different terms and upon additional consideration, he has no claim to relief at law or in equity on account of such fraud.³

22. The recovery of a judgment in the courts of this state, for any debt or obligation contracted in fraud, merges the cause of action, and the defendant cannot be arrested in an action on such judgment.⁴ The rule is the same as to a judgment recovered in any other state of the union, provided that, by the law of such state, the judgment merges the original cause of action.⁵ But not otherwise as the judgment of a sister state has no greater effect here than belongs to it in the state where it was recovered.⁶ The same rule does not apply in regard to a judgment recovered in a foreign country. Such judgment is not conclusive between the parties, and the plaintiff has his election to sue either on the judgment or on the original cause of action. So, a preliminary inquisition had on an English

¹ *Harding v. Shannon*, 20 How., 25. note; *Goodrich v. Dunbar*, 17 Barb., 644.

² *Dubois v. Thompson*, 1 Daly, 309; *S. C.*, 25 How., 417.

³ *Adams v. Sage*, 28 N. Y. R., 108.

⁴ *Mallory v. Leach*, 14 Abb., 449,

⁵ *Id.*

⁶ *Id.*, *Suydam v. Barber*, 18 N. Y. R., 468.

extent, though made by a jury and placed on record, has not, being purely an *ex parte* proceeding, the effect of merging the original cause of action, or of depriving the plaintiff of a provisional remedy incident to that cause in an action in this state. A record, to have that effect, must be the result of the proceeding of a court in which jurisdiction has been acquired of the person of the defendant.¹

23. A female cannot be arrested for fraud in contracting a debt, or incurring an obligation.² But it seems that a false representation by a married woman, carrying on a separate business, that she was making the contract for the use and benefit of such business would render her liable for the prices stipulated in the contract; she could not, however, be held to bail.³

¹ Peel v. Elliott, 16 How., 481.

³ Coster v. Isaacs, 16 Abb., 328;

² Wheeler v. Hartwell, 4 Bosw., 684.

see Baldwin v. Kimmel, 16 Abb., 353.

SECTION VI.

FRAUDULENT REMOVAL, ETC., OF PROPERTY ; ARREST OF FEMALES.

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| <ol style="list-style-type: none"> 1. Subdivision 5, § 179. Attempt to defraud creditors. 2. Proof of actual intent required. 3. What facts are sufficient to justify order. 4. Effect of an assignment. 5. Refusal to pay debt not evidence of fraudulent intent. 6. Threat to assign, when evidence. | <ol style="list-style-type: none"> 7. Removing property through ignorance of the law. 8. Partner cannot arrest co-partner. 9. Fraudulent disposition, etc., in another state, or country. 10. Concerning the <i>secrecy</i> of the removal. 11. Questions bearing upon the fraudulent disposition of property. 12. Arrest of females. 13. Arrest of married women. |
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1. The fifth and last subdivision provides for an arrest, "When the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors. But no female shall be arrested, in any action, except for a willful injury to person, character, or property."

2. Proof of an actual intent to defraud creditors must be given to justify an order of arrest under this subdivision since the intent with which the property is disposed of is the gist of the cause of arrest; and the question of intent is one of fact and not of law, and must be proved by the circumstances and incidents connected with the transaction.¹ The more humane interpretation should be given to the statute and where there is no evidence of actual fraud in a debtor he should not be subject to arrest for acts only constructively fraudulent.² So, where the acts or statements of a party are susceptible of two interpretations,

¹ Pacific Mutual Ins. Co. v. Machado, 16 Abb., 451.

² People v. Kelley, 35 Barb., 444; 13 Abb., 405.

one indicating a fraudulent, and the other a lawful and honest purpose, the latter is to be adopted.¹

3. Under the non-imprisonment act of 1831, the language of which is similar to the above subdivision, where it appeared that the defendant had left the state two months before, and had gone to Canada, with intent to remain there, and had taken with him some portion of his personal property; that he had no family and but little property; that he was offering his property in this state for sale; that he told the plaintiff that "he would be damned glad if he ever got his pay of him;" that no civil process could be served on him, because he kept out of the state; and that he refused to pay any thing on plaintiff's debt. It was held that these facts proved a strong case of intent to dispose of property to defraud creditors.² So, where the defendant was carrying on business at his stores on the day on which the plaintiff's demand was presented for payment, and then told the plaintiff to call in three days and he would pay it; and it appeared that on the third day both his stores were in the possession of other persons, claiming under a bill of sale, dated the preceding day, and that the defendant could not be found on diligent search, it was held to be sufficient to sustain an order of arrest.³

4. The making of an assignment constructively fraudulent is not a ground of arrest in itself; a fraudulent intent must be shown. Thus, where an assignment was made by the defendant for the benefit of creditors, and the preferred creditors were therein enumerated, but no provision made for the surplus which might remain; it was held that conceding the assignment to be void under the statute, it was only constructively so, and could not

¹ *Flour City National Bank v. Hall*,
88 How., 1.

² *Rosenfield v. Howard*, 15 Barb.,
546.

³ *Potter v. Sullivan*, 16 Abb., 295,
note.

justify an order of arrest.¹ But if, after an assignment for the benefit of creditors, the assignor retain and sell a part of the property assigned, the transaction is fraudulent and he may be arrested.² So, where it appeared, on a motion to vacate an order of arrest, that after the defendants had transferred their goods to another firm, one of the defendants admitted that they had made such transfer for the purpose of keeping their stock out of the hands of their creditors; that it was really the same as if they still owned the goods; and that they, the defendants, were still in possession; this admission being corroborated by other evidence, it was held that the order of arrest should be sustained on the ground of fraudulent removal of property.³

5. A mere refusal to pay or provide for a debt, however gross in its nature, does not necessarily show intent of a fraudulent disposal.⁴ Nor, is a mere threat to make an assignment of property, granting preference to others, unless the plaintiff would accept certain terms, made in words which may be construed to mean that he would make a lawful assignment, proof in itself of a fraudulent intent.⁵ Nor is the rule altered by the fact that the defendant had originally promised to give the plaintiff collateral security for his debt, if it is not shown that such security was to have been given out of the assets of the debtor.⁶ For the debtor has the legal right to dispose of all his property to one or more preferred creditors without fraud, and without incurring any liability to attachment or arrest.⁷

6. But, the debtor will not be allowed to use his power to assign, for the purpose of intimidating creditors from pur-

¹ *Spies v. Joel*, 1 Deur, 669; *Birchell v. Strauss*, 28 Barb., 293; 8 Abb., 53.

² *McButt v. Hirsch*, 4 Abb., 441.

³ *Phillips v. Benedict*, 33 Barb., 655; 12 Abb., 356.

⁴ *Hathorn v. Hall*, 4 Abb., 227.

⁵ *Wilson v. Britton*, 26 Barb., 562, 6 Abb., 97.

⁶ *Dickerson v. Benham*, 20 How., 343; 12 Abb., 158.

⁷ *Id.*, *Rigney v. Tallmadge*, 17 How., 556.

suing the remedies allowed by law to collect their debts, without being chargeable with fraudulent intent.¹ And, where a debtor refuses to pay a demand against him, and is told by the creditor that he will be sued, and thereupon threatens that if he is sued, he will turn over all his property, and that the creditor will not get a cent, the fraudulent intent is clear.²

7. Where a judgment debtor, being advised by the officer who levied the execution, that certain property was exempt, carried it openly into another state; it was held that whether it was so exempt or not, the debtor, not being at all acquainted with the law, was justified in doing so, at least as far as any fraud was concerned and could not be arrested under the law of 1831, the text of which is similar to this.³

8. One partner cannot have an order of arrest against a co-partner on an allegation under this subdivision. His only remedy to prevent the removal or disposition of partnership assets is by an action for an injunction and receiver.⁴ Nor, can an arrest be had in a suit in equity to set aside an assignment for the benefit of creditors, or other instrument, on the ground that it was made to hinder, delay or defraud creditors.⁵

9. This provision is not limited to the citizens of our own state, but applies alike to citizens of any other state. So, that where the defendant is the resident of another state, where the fraud was committed, if he afterwards come here, he may be arrested notwithstanding that he could not have been arrested in his own state.⁶ But it is held otherwise as to foreigners. It was decided that a fraudulent disposition of property in a foreign country to

¹ *Gasherie v. Apple*, 14 Abb., 64.

² *Livermore v. Rhodes*, 27 How., 506; see p.

³ *Krauth v. Vial*, 10 Abb., 139.

⁴ *Cary v. Williams*, 1 Duer, 667.

⁵ *People v. Kelley*, 35 Barb., 444.

⁶ *Palmer v. Kaufman*, N. Y. Superior Court, 1854; *Hoff. Pro. Rem.*, 33.

defraud foreign creditors, could not authorize the arrest of the defendant in this state, although he had brought the property with him.¹

10. It was held in one case that to come within the purview of this subdivision, the removal or disposal must be secret.² But that conclusion is doubtful. The fraudulent intent is the gravamen of the cause of arrest; and secrecy is only one way of evincing such intent. It is very possible to remove or dispose of property openly and publicly, and yet do it with intent to defraud creditors. It has also been intimated in one case, at least, that an arrest could not be had under subdivision fifth, except in actions for the recovery of money; but the case was decided on other points and the above intimation wholly *obiter*.³

11. The question bearing upon fraudulent disposition of property will be more fully considered hereafter under the head of attachments, to which remedy most of the reported decisions refer.⁴

12. All of the subdivisions of section 179, are limited by the latter part of subdivision five, which provides, that "no female shall be arrested in any action, except for a willful injury to person, character, or property." Therefore, a female cannot be arrested in an action for a breach of promise of marriage⁵; nor for the concealment or disposal of property;⁶ nor for fraud in contracting a debt or incurring an obligation.⁷ But a fraudulent conversion of property by a female, was held to be a willful injury for which she could be arrested. As where a female fraudulently took certificates of stock, disposed

¹ *Blason v. Bruno*, 21 How., 112, 33 Barb., 520.

² *Anon.*, 2 Code R., 51.

³ *People v. Kelly*, 35 Barb., 444, per Bockes.

⁴ Chap. 1V, sec. 1.

⁵ *Siefke v. Tuppey*; 3 Code R., 23.

⁶ *Tracey v. Leland*, 2 Sandf., 729; overruling *Starr v. Kent*; 2 Code R., 30.

⁷ *Wheeler v. Hartwell*, 4 Bosw., 684.

thereof and converted the proceeds to her own use.¹ As a female cannot be arrested before judgment in *any* action, except for a willful injury, etc., so she cannot be taken in execution after judgment except in the like cases.²

13. The above provision has no relation whatever to married women, and the common law which exempts them from arrest in all civil actions remains unchanged. So, that even in action for willful injury to person, character, or property, a married woman is not arrestable.³ The superior court of New York, have decided that the Code did not authorize the arrest of the husband either upon the contract or tort of his wife.⁴ But, the New York common pleas hold that the husband can still be arrested for the torts of his wife, and, that he was bound to put in bail for both; and that though the wife is entitled to a discharge in the first instance, on proof of coverture, she may, nevertheless, be charged in execution with him after judgment.⁵ The recent statutes of 1860 and 1862, regarding the rights of married women, do not profess to touch this question.⁶ Where a married woman brings an action for the conversion of property, and judgment is rendered against her for costs, she is not liable to arrest upon an execution issued against her person for such costs.⁷

¹ Northern R. R. Co. v. Carpenter, 13 How., 222.

² Hovey v. Starr, 42 Barb., 435.

³ Anon., 1 Duer, 613; 8 How., 134; Baldwin v. Kimmel, 16 Abb., 353; Schaub v. Putscher, 25 How., 463.

⁴ Id.

⁵ Solomon v. Waas, 2 Hilton, 179.

⁶ See Schaus v. Putscher, 25 How., 463.

⁷ Hovey v. Starr, 42 Barb., 435.

SECTION VII.

AFFIDAVIT TO OBTAIN ORDER.

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| <ol style="list-style-type: none"> 1. § 181. Affidavit to obtain order. 2. How the facts should be set forth. 3. Must be stated positively. 4. When affidavit should not be entitled. 5. Should state that an action is commenced. 6. When defendant's name is unknown. 7. When complaint may be used as affidavit. 8. When the affidavit may charge in the alternative. 9. When examination of judgment debtor may be used. | <ol style="list-style-type: none"> 10. Where arrest is sought under subdivision 4, § 179. 11. In actions for malicious prosecution and false imprisonment. 12. For disposing of property, <i>crim. con.</i> 13. How non-residence or intended departure, alleged. 14. How title of married woman to property. 15. Giving bail waives formal defects in affidavit. 16. Sheriff to file affidavits. |
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1. "The order may be made, where it shall appear to the judge, by the affidavit of the plaintiff, or of any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 179. The provisions of this chapter shall apply to all actions included within the provisions of section 179, which shall have been commenced since the thirtieth day of June, 1848, and in which judgment shall not have been obtained." ¹

2. It must clearly appear by the affidavit that a sufficient cause of action exists, and that the case is within section 179. These essentials must appear from the statement of facts and circumstances, and not from a bare allegation in the words of the statute.² It is neither necessary nor sufficient to allege that a cause of action exists, and "that the case is one of those mentioned in section 179;" nor is it sufficient to state the facts generally, as "that the defendant has been guilty of a fraud in con-

¹ Code, § 181.

² *Pindar v. Black*, 4 How., 95; 15 How., 48.

tracting the debt ; ” nor, “ that the defendant has removed or disposed of his property with intent to defraud his creditors.”¹ Such statements are legal conclusions deduced from certain facts, and their adoption as the basis for an order of arrest would be to substitute the conclusions of the person who makes the affidavit for that of the judge.

3. It is the duty of the judge to determine whether a sufficient cause of action exists, and whether the case is one of those mentioned in section 179, and to enable him to do this, the facts constituting the cause of action, and the facts constituting the cause of arrest, must be plainly and fairly stated. So far as such facts lie within the knowledge of the affiant ; they must be stated positively, but so far as they rest on information derived from others, they may be so stated, when the sources and nature of the information are particularly set forth, and a good reason given why a positive statement of them cannot be had.² It must be observed that there is a distinction between *stating* the sources of information and *setting them forth*. If the affiant’s knowledge is derived from letters, papers or official documents in his possession, or which it is in his power to procure, it would not be sufficient to state that the information was derived from such papers, but the papers themselves, or copies of them must be set forth or presented with the application. If they are not in his possession, or if it is out of his power to procure them, or copies of them, he should so state in his affidavit.³ It is a general rule that if the affidavit be made on the information of another, it should state why the informant did not make the affidavit himself.⁴ But an affidavit on mere unsupported

¹ Frost v. Willard, 9 Barb., 440.

² Whitlock v. Rath, 5 How., 143 ; 419 ; and cases.

Bell v. Mali, 11 How., 255 ; Cook v. Roach, 21 How., 152 ; Satow v. Reisenberger, 25 How., 164.

³ De Nierth v. Sidner, 25 How.,

⁴ Bell v. Mali, 11 How., 255 ; Blason v. Bruno, 21 How., 112.

hearsay will be wholly insufficient,¹ and where it appears that the facts were only known from information, it will make no difference that the affiant has stated them as of his own knowledge.²

4. The affidavit should not be entitled in the cause where it is made before the action is commenced; but if entitled, it is an error that does not affect the substantial rights of the adverse party, and will be disregarded under section 176 of the Code.³ But where the action is already commenced the affidavit should be entitled.

5. In *Pinder v. Black* it was held that the affidavit need not state either that an action has been, or is about to be commenced.⁴ Nevertheless, the affidavit should contain a statement to that effect. The obvious intention of the law is to guard against the granting of improvident orders of arrest, and it can be no hardship to require a man to state that he has done or intends to do that which it is absolutely necessary he should do, or intend to do, before he can have any substantial reason for obtaining such an order.⁵

6. When the name of the defendant is unknown, and cannot be ascertained, he may be designated by a fictitious name, and when his true name is ascertained it may be inserted as an amendment.⁶

7. In cases where the cause of action and of arrest are identical, the complaint, if properly verified, may suffice as an affidavit; so, where the complaint is before the judge on an application for an order of arrest, based on affidavit, and the affidavit proves defective, the plaintiff may, in opposing a motion to vacate the order, refer to the complaint to sustain the defective affidavit.⁷ But under

¹ *Bell v. Mali*, 11 How., 255; *Cook v. Roach*, 21 How., 152.

² *Moore v. Calvert*, 9 How., 474.

³ *Pindar v. Black*, 4 How., 95; *City Bank v. Lumley*, 28 How., 397.

⁴ 4 How., 95.

⁵ See *Holmes & Disbrow's Prac.*, 64.

⁶ *Pindar v. Black*, 4 How., 95; Code § 175.

⁷ *Brady v. Bissell*, 1 Abb., 76; *Turner v. Thompson*, 2 Abb., 444.

no circumstances should the affidavit state facts inconsistent with the allegations of the complaint. Thus, where the complaint prayed damages for conversion of property, and the affidavit alleged facts for an order of arrest under subdivision third of section 179, the order was refused.¹ But the absence of averments of fraud in the complaint will not invalidate the order of arrest.²

8. Where there is a clear cause for an arrest under one of two or more clauses or subdivisions of the section, the affidavit may state all the facts, and charge in the alternative. Thus, where the defendant has concealed, removed or disposed of his property, so that it cannot be found or taken by the sheriff, it may be charged that he did it with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.³ This decision is relative to affidavits for attachments, but the principle is equally applicable to arrests.

9. The examination of a judgment debtor under section 292 of the Code, disclosing grounds of arrest, may be used as the basis of an application for an order of arrest in a subsequent action on the judgment.⁴

10. If the order of arrest is sought under subdivision four of section 179, the affidavit should show all the facts necessary to entitle the plaintiff to recover. Thus, in an action for the value of goods which were obtained by fraudulent representations, the affidavit should show "that the defendant, at such a time and place, requested the plaintiff to sell him certain goods on credit; that for the purpose of inducing the plaintiff to sell such goods on credit, the defendant then and there falsely and fraudulently stated and represented to the plaintiff that he, the

¹ Seymour v. Van Curen, 18 How., 95; Wicker v. Harmon, 21 How., 462.

² Mucklan v. Doty, 20 How., 236; See Corwin v. Freeland, 2 Seld., 563.

³ Van Alstyne v. Erwin, 11 N. Y. R., 331; see also Morgan v. Avery, 7 Barb., 646.

⁴ MoButt v. Hersch, 4 Abb., 441.

defendant, etc. (*setting forth the exact representations*); that the plaintiff believed such statements and representations to be true, and was thereby induced to, and did, sell and deliver to the defendant, upon credit, the goods so applied for by him, and that except for such statements and representations, the plaintiff would not have made such sale and delivery; and that all of said statements and representations (*or a part of the same, specifying which*), were false and untrue when so made, to the knowledge of the defendant; and that the defendant made the same with intent to defraud the plaintiff by obtaining the said goods upon credit and without paying for them." And, in addition to this, the affidavit must give a detailed statement of all the facts and circumstances within the affiant's knowledge, going to show that the representations were false and fraudulent when made. The respect in which the representations are false must be pointed out; a general allegation of falsity will not suffice.¹ (For form, see appendix No. 8).

11. In an action for malicious prosecution, an affidavit for holding the defendant to bail is insufficient, when it states only in general terms the existence of malice and the want of probable cause. The facts which are relied on as evidence of the want of probable cause, must be set forth in the affidavit, so that the judge may determine whether or not there was malice or probable cause.² Where a person has, in good faith, upon oath or otherwise, merely stated his case to a magistrate having jurisdiction of the offense supposed to have been committed, and of the person accused, he is not liable to an action for false imprisonment upon the consequent arrest of the

¹Smith v. Jones, New York Superior court, Dec., 1865, per Barbour J. ; Draper v. Beers, 17 Abb., 163.

²Vanderpool v. Kissam, 4 Sandf., 715.

accused, even though such arrest was not warranted by the law or the facts of the case.¹

12. When the charge is that the defendant is about to dispose of his property with intent to defraud his creditors, the judge must have legal evidence tending to convict the defendant of the charge, before granting the order.² But in an action for *criminal conversation* with plaintiff's wife, an affidavit which states nothing more than a cause of action will be sufficient.³ (See form No. 9).

13. In setting forth the grounds of arrest, it is not enough to allege that the defendant is a *citizen* of another state, for he may be a citizen of one state and a resident of another.⁴ Nor is the allegation that the defendant is "going out of this state" sufficient. It should appear that the removal is an actual change of residence, and not a mere visit.⁵ (See form No. 3).

14. Where a married woman obtains an order of arrest for the misapplication of property, a general allegation that the property was her separate property will be sufficient, without showing how it became so.⁶

15. A defendant, by giving bail, admits the sufficiency of the affidavit, and waives his right to object to any formal defects therein.⁷

16. The sheriff must file with the clerk the affidavits on which an order of arrest is made, within ten days after the arrest.⁸ (For forms of affidavits see appendix Nos. 1 to 9).

¹ Van Latham v. Rowan, 17 Abb., 238.

² Courter v. McNamara, 9 How., 255.

³ Sacho v. Bertrand, 22 How., 95.

⁴ McKiernan v. Messingell, 6 Sme. & Mar., 377.

⁵ Brophy v. Rodgers, 7 N. Y. Leg. Obs., 152.

⁶ Lippman v. Petersburg, 10 Abb., 254.

⁷ Stewart v. Howard, 15 Barb., 26.

⁸ Sup. Court, rule 7.

SECTION VIII.

SECURITY ON THE PART OF THE PLAINTIFF.

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| 1. § 182. Security by plaintiff before order of arrest. | 5. Undertaking to be proved or acknowledged. |
| 2. Absolutely necessary. | 6. Amount of undertaking. |
| 3. Sureties not necessary. | 7. Judge's approval must be indorsed. |
| 4. Plaintiff need not sign undertaking. | 8. Undertaking to be filed. |

1. "Before making the order, the judge shall require a written undertaking on the part of the plaintiff, with or without sureties to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking which shall be at least one hundred dollars. If the undertaking be executed by the plaintiff without sureties, he shall annex thereto an affidavit that he is a resident and householder or freeholder within the state, and worth double the sum specified in the undertaking, over all his debts and liabilities."¹

2. An undertaking is absolutely necessary before the judge can acquire jurisdiction to grant the order; and an order granted without it will be void.²

3. But it rests in the discretion of the judge, to determine whether or not he will require sureties. The only restraint upon the exercise of his discretion is, that if no sureties be required, the plaintiff shall justify in the manner prescribed. Where the judge sees fit to require sureties it is left to him to satisfy himself in respect to the

¹ Code, § 182.

² Newell v. Doran, 21 How., 427.

sufficiency thereof, and therefore if an undertaking executed by one surety be deemed sufficient by him, the law will be satisfied and the order granted will be sustained.¹

4. In the superior court it was formerly held that the plaintiff himself must execute the undertaking in all cases, even though a non-resident.² But it is now well settled, that where sureties are required, the undertaking need not be signed by the plaintiff, nor any agent of his.³ Where a foreign state is plaintiff, the undertaking may be executed by the admitted agent of that state, as its resident minister.⁴

5. Where sureties are required, they must justify, and the undertaking must be acknowledged, or proved in like manner, as deeds of real estate.⁵ But if the undertaking is otherwise sufficient and there has been an omission to acknowledge it, it may be amended in that respect and be acknowledged *nunc pro tunc*;⁶ or if it is improperly executed in any respect it can be amended on motion to the court.⁷

6. The undertaking must be in the sum of at least one hundred dollars, but the judge may require it to be in a greater sum.

7. The approval of the judge granting the order, must be indorsed upon the undertaking, or the proceeding will be vacated for irregularity with costs, as if no undertaking had been given.⁸

8. It is not necessary to serve a copy of the undertaking upon the defendant, but the original must be filed with the

¹ *Courter v. McNamara*, 9 How., 255; see also *Ward v. Whitney*, 4 Seld., 442.

² *Richardson v. Craig*, 1 Duer, 666.

³ *Askins v. Hearn*, 3 Abb., 184; *Bellinger v. Gardner*, 2 Abb., 441; 12 How., 381; *Courter v. McNamara*, 9 How., 255.

⁴ *Republic of Mexico v. Arrangois*, 5 Duer, 634; 11 How., 576.

⁵ Sup. Court, rule 6.

⁶ *Conklin v. Dutcher*, 5 How., 386.

⁷ *Bellinger v. Graham*, 12 How., 381.

⁸ Sup. Court, rule 4; *Newell v. Doran*, 21 How., 427.

clerk of the proper county, within five days after the granting of the order, with the approval of the justice indorsed thereon, or the proceedings will be vacated with costs.¹ However, where a party omits by inadvertence to file the undertaking as required, the court may relieve him.² (For form of undertaking, see appendix No. 10).

¹ Sup. Court, rule 4.

² *Leffingwell v. Chave*, 19 How., 55; 10 Abb., 472.

SECTION IX.

ORDER OF ARREST, BY WHOM MADE AND ITS FORM.

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| 1. § 180. Order of arrest, by whom made. | 9. What judgment will bar order of arrest. |
| 2. § 183. When made and its form; time to move to vacate. | 10. Indorsement on order of arrest for penalty, etc. |
| 3. When made by county judge, in what county. | 11. What amount of bail to be specified in order. |
| 4. What local officers may grant. | 12. As to the time of return of the order. |
| 5. In what capacity county judge acts. | 13. Not to be returnable on Sunday. |
| 6. Judge related to either party cannot grant. | 14. When time of return may be extended. |
| 7. Name of defendant, how inserted. | 15. Order to be subscribed or indorsed by plaintiff or attorney. |
| 8. Summons need not be served, before granting. | 16. Within what time judge to decide motion for order. |

1. "An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought, or from a county judge."¹

2. "(1). The order may be made to accompany the summons, or at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found, forthwith to arrest him, and hold him to bail in a specified sum, and to return the order at a time and place therein mentioned, to the plaintiff or attorney by whom it shall be subscribed or indorsed. (2). But said order of arrest shall be of no avail, and shall be vacated or set aside on motion, unless the same is served upon the defendant, as provided by law, before the docketing of any judgment in the action; and the defendant shall have twenty days after the service of the order of arrest in which to answer the complaint in the action, and to move to vacate the order of arrest or to reduce the amount of bail."²

The second part of section 183 was added in 1862.

¹ Code, § 180.

² Code, § 183.

3. Where the application for an order of arrest is made to a county judge it must be to the county judge of the county where the action is triable, or to the county judge of the county in which the attorney for the moving party resides.¹ By "the county where the action is triable" is meant the county named in the complaint as the place of trial.²

4. A local officer elected to discharge the duties of surrogate, or any officer authorized to discharge the duties of a judge at chambers, may grant an order of arrest, although there is a county judge in the county not disqualified to act.³

5. When the order is made by a county judge or local officer, he acts as a justice of the supreme court at chambers, and his order is to be reviewed in the same manner as an order at chambers.⁴

6. A judge related to either party by consanguinity or affinity, within the degree which would exclude him as a juror cannot grant an order of arrest.⁵

7. The order should conform in the christian and surname of the defendant with the name in the summons; but if the plaintiff is ignorant of the defendant's name, he may designate him in the order, by any name, and when his true name shall appear, the order may be amended accordingly.⁶ But when the plaintiff is ignorant of the name of the defendant, he should aver that fact in the affidavit on which the motion is made.⁷

8. It is not essential that the summons be served before

¹ See Code, § 401, as amended in 1859.

² Gould v. Chapin, 4 How., 185; Bangs v. Selden, 13 How., 163.

³ Seymour v. Mercer, 13 How., 564.

⁴ Conklin v. Dutcher, 5 How., 386.

⁵ See N. Y. & N. Haven R. R. Co. v. Schuyler, 28 How., 187. The

above decision was as to an injunction order, but the rule is the same on arrests.

⁶ Pindar v. Black, 4 How., 95; Code, § 175.

⁷ Id. See Crandall v. Beach, 7 How., 271.

the order is granted,¹ but it should be prepared; and it is the practice in some of the courts to require its exhibition or proof of its having been issued, before granting the order.

9. The order cannot be granted after judgment; but if the judgment has been vacated, on the application of the defendant with leave to answer, with a provision that the judgment shall stand as security, it is no longer to be regarded as a judgment within the meaning of section 183, and will not bar an order of arrest.²

10. In actions for penalty or forfeiture given by the statute, an indorsement is required on the order, referring in general terms to the statute upon which the action is brought.³ The indorsement should be sufficiently explicit to enable the defendant to ascertain the precise statute upon which the action is brought.⁴ If practicable it should contain a reference to the chapter, title and section.

11. The amount of the bail to be specified in the order is to be fixed by the judge who grants the order. The amount will depend upon the cause of action. In suits to recover fines or penalties, or property taken or money received, or for fraudulently contracting a debt, the amount of bail will generally be double the sum claimed or double the value of the property taken; and in actions for injuries to person or character, it will be such sum as the judge shall fix upon, in view of the nature and extent of the injuries complained of. In actions of the latter class care should be taken that the bail is not excessive or beyond the power of the defendant to obtain, and a less

¹ See *Gould v. Bryan*, 8 Bosw., 626.

² *Mott v. Union Bank*, 16 How., 525; 8 Abb., 150; affirmed, 17 How., 353; 9 Abb., 106.

³ 3 R. S. (5th ed.), 784.

⁴ See *Andrews v. Harrington*, 19 Barb., 344; *Avery v. Slack*, 17 Wend., 86; *Perry v. Tynen*, 21 Barb., 139.

amount should be required when the parties are permanent residents than if they were transient persons.¹

12. The order is to be returned at a time and place therein mentioned, to the plaintiff or attorney by whom it shall be subscribed or indorsed. Such time and place are to be fixed by the judge who grants the order. It must be a reasonable time, so as to enable the sheriff after receiving the order, with proper diligence, to arrest the defendant. But it is not essential to name a day certain. It may be made returnable within a specified time after the arrest of the defendant.²

13. Care should be taken not to make the order returnable on Sunday. Under the former practice, making such order returnable on Sunday was fatal, and could not be amended.³

14. When the defendant has not been arrested before the return day, the time of the return may be altered by the judge who granted the order. But the time should not be changed by another judge of the court. The better course is to obtain a new or *alias* order.

15. The order should be subscribed or indorsed by the plaintiff or his attorney.

16. Whenever any motion for an order of arrest shall be made, it is the duty of the judge, before whom such motion is made, to render and make known his decision thereon within twenty days after the day on which such motion shall be submitted to him for his decision.⁴ (For form of order, see appendix Nos. 14, 15).

¹ Baker v. Swackhamer, 3 Code R., 248. ³ Stone v. Martin, 185 ; Gould v. Spencer, 5 Paige, 541 ; Miller v. Gregory, 4 Cow., 504.

² Continental Bank v. De Mott, 8 Bosw., 696. ⁴ Code, § 401, sub 8.

SECTION X.

THE ARREST, WHEN AND HOW MADE.

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| <ol style="list-style-type: none"> 1. § 184. Affidavit and order to be delivered to sheriff and copy to defendant. 2. Attorney's duty on obtaining order. 3. Duty of sheriff on receiving order. 4. Effect of omitting to serve copies on defendant. 5. Effect of omitting in copies the name of affiant or officer. 6. Copy of undertaking not to be served. 7. Sheriff to file affidavits within ten days after arrest. 8. § 185. <i>Arrest, how made.</i> 9. By whom the order may be executed. 10. When the arrest may be made. 11. Persons privileged from arrest. 12. Senators and representatives, when. 13. Members of legislature. 14-15. Embassadors, etc., when privileged. 16. Persons in the military or naval service of the United States. 17. Or in the militia of the state. 18. Canal officers, in what cases exempt. 19. Members of the metropolitan and capital police, when. 20. Attorneys and counsellors, when privileged. 21. Officers of courts of record. 22. Parties to a suit. 23. Witnessed in a suit, duly subpoenaed. 24. Course where witness has been arrested. 25. Voters at an election or town meeting. 26. Females, when privileged. 27. Persons in the custody of the law exempt. | <ol style="list-style-type: none"> 28. Where one is discharged by reason of temporary privilege. 29. Duty of sheriff when defendant claims to be privileged. 30. Where arrests may be made. 31. When officer may enter dwelling house to make. 32. Who are protected by the privilege of a dwelling. 33. Privilege limited to dwellings. 34. Where the whole or part of a house is rented. 35. If outer door of a dwelling open, officer may enter. 36. When defendant escapes, officer may break outer door to retake him. 37. <i>Arrest, how made.</i> 38. Cannot be enticed within jurisdiction, by fraud. 39. Detaining defendant on subsequent process. 40. Serving copies on defendant. 41. Making return of the order. 42. Sheriff to retain defendant in custody. 43. To admit him to jail liberties on receiving bond. 44. Duty of sheriff in taking security for the liberties. 45. Sureties in bond may surrender principal. 46. What is an <i>escape</i> from the liberties. 47. Duty of the defendant in keeping within liberties. |
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1. "The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant shall deliver to him a copy thereof."¹

2. The plaintiff's attorney having obtained the order of

¹ Code, § 184.

arrest and filed his undertaking, should at once deliver such order and the affidavits on which it was granted to the sheriff of the county wherein the defendant may be found. He should also prepare and deliver with the order and affidavit, copies thereof. It is really the duty of the sheriff to prepare such copies, but the usual practice is for the plaintiff's attorney to prepare them and give them to the sheriff with the originals.

3. On receiving the affidavit and order it becomes the duty of the sheriff forthwith to arrest the defendant, and thereupon to deliver to him a copy of such affidavit and order.

4. But should the sheriff neglect to serve the copies on the defendant, it will be an irregularity only, and will not entitle the defendant to his discharge; since the latter provision of the section directing a delivery of the copies is directory merely; nevertheless, in case of such omission the defendant may move for an order on the plaintiff to serve him with a copy of the order of arrest, and his motion will be granted with costs.¹

5. Nor is an omission in the copy of the affidavit of the name of the affiant, or of the officer before whom the affidavit was sworn to fatal. It is an irregularity which may be cured under section 174.²

6. A copy of the undertaking need not be served on the defendant.³

7. It is the duty of the sheriff to file with the clerk the affidavits on which an order of arrest is granted within ten days after the arrest is made.⁴

8. "The sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged

¹ Keeler v. Belts, 3 Code R., 183; Courter v. McNamara, 9 How., 257; Barker v. Cooke, 40 Barb., 254; 16 Abb., 83; 25 How., 190.

² Barker v. Cook, *supra*.

³ Leopold v. Poppenheimer, 1 Code R., 39.

⁴ Sup. Court, rule 7.

by law; and may call the power of the county to his aid in the execution of the arrest, as in case of process.”¹

9. The order may be executed by the sheriff, under sheriff, or general deputy; or it may be executed by a special deputy appointed for the purpose; but if such special deputy be appointed at the request of the plaintiff, or his attorney, the sheriff will not be responsible for his acts; and cannot be compelled to return the process executed by him.²

10. The arrest may be made at any time before or on the day limited for the return of the order, at any hour of the day or night;³ but if made after the return day, or on a Sunday it will be utterly void;⁴ and so if made on an election day so far as regards any qualified elector.⁵ But if the defendant escape after a proper arrest, he may be rearrested on Sunday or election day by his bail, or their agent or by the officer.⁶

11. There are many cases in which the defendant, by reason of his station or other circumstances, is exempt from arrest, and, although an order may have been granted for his arrest, the sheriff may render himself liable if he execute the same.

12. Thus senators and representatives in congress are exempt from arrest, in all cases, except treason, felony and breach of the peace, during their attendance at the session of their respective houses, and in going to or returning from the same.⁷ This privilege is allowed only while the party is attending congress, or is actually on his journey going to or returning from the seat of government.⁸

13. So members of the state legislature are privileged

¹ Code, § 185.

² 1 Chitt. R., 614, note; 4 T. R., 119; 2 Est., 591.

³ 1 Bing., 66; 2 Burr, 812; 2 Chitt. R., 857.

⁴ 2 R. S. (5th ed.), 935; 3 John., 259; 12 id., 178; 15 id., 177; 12 Wend., 57.

⁵ 1 R. S. (5th ed.), 118; Laws 1842, ch. 130.

⁶ Gra. Prao., 149; Sewell, 117, 119.

⁷ Const. U. S., art. 1, sec. 6.

⁸ 2 John.'s Cases, 222.

from arrest, during their attendance at the session of the house to which they belong, except on process in any suit for a forfeiture, misdemeanor or breach of trust in any office or place of public trust.¹ This privilege embraces the period of fourteen days previous to the session, and also while going to or returning from such sessions, provided the time of such going or coming does not exceed fourteen days.² But this privilege cannot avail a member after he shall have actually arrived home, although the fourteen days have not expired.³ The same privilege also extends to a member during an adjournment of the legislature when such adjournment does not exceed fourteen days,⁴ or while absent with leave of the house to which he belongs;⁵ and also to all officers of both houses while in actual attendance upon the house.⁶

14. An ambassador or other public minister of any foreign prince or state, authorized and received as such by the president of the United States; or any domestic, or servant of any such ambassador or other public minister, is exempt from all process in a state court; and any process against either of them is void.⁷ This exemption includes consuls and vice-consuls;⁸ and the fact that a consul is impleaded with a citizen upon a joint contract gives no jurisdiction to a state court.⁹ Nor can the consul waive his privilege; and therefore further proceedings will be arrested, at any stage of the case when it appears that the court has no jurisdiction.¹⁰ An ambassador from one foreign state to another is also privileged from arrest while traveling through a state to which he is not accredited, in the execution of the duties of his mission.¹¹

¹ 1 R. S. (5th ed.), 455.

² 1 R. S. (5th ed.), 455, § 7.

³ *Corey v. Russell*, 4 Wend., 204.

⁴ 1 R. S. (5th ed.), 455, § 8.

⁵ *Id.*, § 9.

⁶ *Id.*, § 10.

⁷ Act of Congress, April 30, 1790; Story's Laws, U. S., 88, § 25.

⁸ Act of 1789, ch. 20, § 9; 2 Dall., 299.

⁹ *Valarino v. Thompson*, 3 Seld., 576.

¹⁰ *Id.*, *Davis v. Packard*, 7 Peters, 276; 8 *id.*, 314.

¹¹ *Holbrook v. Henderson*, 11 Sandf., 619.

15. In the case of an ambassador's servant the privilege belongs to the ambassador and not to the servant, and if the former makes no application for his servant's discharge, the court will not interfere, unless the servant himself shows a clear case of service or hiring.¹ Such servant should move for his discharge upon affidavits, setting forth the capacity in which he is hired;² that he is a domestic servant;³ that he was such at the time of the arrest;⁵ and that he performed the duties of his office.⁴

16. All non-commissioned officers, artificers, privates, musicians, seamen and marines, who are, or shall be enlisted, and the non-commissioned officers, artificers, privates and musicians of the militia, or any other officer, who at any time may be in the actual service of the United States, shall be exempt during their term of service, from all personal arrests for any debt or contract; and in case any person belonging to either of these classes shall have been arrested, either on mesne or final process, it is made the duty of the judge of the district court of the United States, and any court or judge of the state authorized to issue writs of habeas corpus, respectively, on application by an officer, to grant a writ of habeas corpus returnable before himself; and upon due hearing and examination in a summary manner to discharge such person from arrest taking common bail if required in any case upon mesne process and commit him to the applicant or some other officer of the same corps.⁶

17. So, persons belonging to the militia of the state are privileged from arrest while going to, remaining at, or returning from any place at which they may be required

¹ Fisher v. Begrez, 2 Dow., P. C., 282.

² Holmes v. Gordon, Hard., 3; Midmore v. Alvarez, Fitz., 200.

³ Barnes, 370; 3 Dow. & Ryl., 25.

⁴ Burr, 2015.

⁵ 1 Dow., P. C., 588.

⁶ 1 Story's Laws, U. S., 543, 709; 2 id., 835; act Jan. 11th, 1793, § 5; act March 16th, 1799, § 9; act March 30th, 1802, § 23; see Barnes R., 95, 114.

to attend for election of officers, or other military duty,¹ and also on parade days, from the rising to the setting of the sun.²

18. No acting commissioner, superintendent of repairs, collector, or lock keeper on any canal, shall be held to bail or taken by warrant in any civil suit for any act done or omitted to be done by him in the exercise of his official duties.³

19. The privilege also includes all members of the metropolitan,⁴ or capital police,⁵ while actually on duty. Although, by a rule of the police commissioners, the metropolitan police officers are deemed to be always on duty, yet to entitle them to an exemption from arrest they must be *actually* on duty.⁶

20. Attorneys and counsellors are exempt from arrest during the sittings of a court where they are employed in some cause pending and then to be heard in such court;⁷ also, while attending court for the purpose of making a special motion.⁸ But the exemption does not extend to an attorney or counsellor while attending before a judge *out* of court;⁹ nor where he has ceased to practice for a year and has entered into other employment.¹⁰ Nor when he is sued with any other person.¹¹ Such attorney or counsellor is not privileged from arrest while remaining at home, although about to attend court.¹² The exemption from arrest being a personal privilege, can be waived by the attorney; and such waiver may be presumed from his conduct.¹³

21. So all other officers of the several courts of record,

¹ 1 R. S. (5th ed.), 771.

² *Id.*, 742.

³ 1 R. S. (5th ed.), 588, § 61.

⁴ Laws 1857, ch. 569, § 18.

⁵ Laws 1865, ch. 554, § 27.

⁶ *Hart v. Kennedy*, 15 Abb., 290, 14 Abb., 432; 23 How., 417; 24 How., 425; see *Squires case*, 12 Abb., 38.

⁷ 3 R. S. (5th ed.), 480, § 74.

⁸ *Humphrey v. Cummings*, 5 Wend., 90.

⁹ *Cole v. McClellan*, 4 Hill, 59.

¹⁰ 2 John.'s Cases, 102.

¹¹ 3 R. S. (5th ed.), 480, § 74.

¹² *Corey v. Russell*, 4 Wend., 204.

¹³ *Cole v. McClellan*, 4 Hill, 59.

including sheriffs, are privileged from arrest during the actual sitting of the court of which they are officers, except when sued with any other person, in which case they are not privileged even during the sitting of the court.¹ Jurors are likewise exempt while going to, attending and returning from the court to which they were summoned. A sheriff is privileged only during the actual sitting of the court of which he is an officer.²

22. Parties to a suit are likewise privileged from arrest while going to, attending and returning from any court, reference or arbitration, for the purpose of attending the trial or hearing of such suit; also, while awaiting the verdict of the jury, or attending upon other proceedings in the cause.³ But they are not privileged while waiting for the referee's report; or while engaged in preparing papers to move to set the report aside.⁴ Where a party attends in good faith, before the day of trial, he is entitled to the privilege.⁵ But one convicted of an assault and battery at a court of special sessions is not protected in returning therefrom, from an arrest in a civil action for the same offense.⁶ A non-resident party to an action here who attends court as a witness is also privileged from arrest.⁷

23. Every person, duly and in good faith subpœnaed as a witness to attend any court, officer, commissioner or referee, or summoned to attend any judge, officer or commissioner in any case where the attendance of such witness may be enforced by attachment or commitment, shall be exonerated from arrest in any civil suit while going to the place where he shall be required by such subpœna to

¹ 3 R. S. (5th ed.), 480, § 74.

² Hill v. Lott, 10 How., 46.

³ Clark v. Grant, 2 Wend., 257; Sanford v. Chase, 3 Cow., 381; see also 1 Edw. Ch. R., 118; 4 Dal., 378, 1 H. Black, 636.

⁴ Clark v. Grant, *supra*.

⁵ 11 East, 439; 1 Camp., 229.

⁶ Lucas v. Albee, 1 Denio, 666; see Williams v. Bacon, 10 Wend., 636.

⁷ Merrill v. George, 23 How., 331.

attend, while remaining at such place and while returning therefrom.¹ By the common law witnesses had all the privileges of parties to a suit, whether subpœnaed or not;² but the revised statutes confines the privilege to witnesses duly subpœnaed. So, that a witness who attends voluntarily without a subpœna is not protected,³ unless he came from another state, in which case he is protected even though not subpœnaed.⁴ The exemption does not extend to one who appears and testifies under a subpœna, and afterwards, on the adjourned day, reappears voluntarily;⁵ nor to persons not in attendance strictly as witnesses.⁶

24. The court or officer before whom any person shall have been in good faith subpœnaed to attend as a witness, shall discharge such witness from arrest made in violation of this privilege; and if such court shall have adjourned before such arrest was made, and before application for such discharge be made, any judge of such court, or the county judge shall have the same power to discharge such witness. Every arrest of a witness made contrary to the foregoing provisions, shall be absolutely void, and shall be deemed a contempt of the court issuing the subpœna; and every person making such arrest shall be responsible to the witness arrested for three times the amount of the damage, which shall be found by the jury, and shall also be liable to an action at the suit of the party who subpœnaed such witness, for the loss, hindrance and damages sustained by him in consequence of such arrest. But no sheriff or other officer, or person shall be liable, unless the person claiming an exemption from arrest shall, if required by such sheriff or officer, make an affidavit stating: 1. That he has been legally subpœnaed as a witness to attend before some court or

¹ 3 R. S. (5th ed.), 685.

² *Cole v. McClellan*, 4 Hill, 60, note a; *Norris v. Beach*, 2 John., 294.

³ *Hardenbrook's case*, 8 Abb., 416.

⁴ *Seaver v. Robinson*, 3 Duer, 622; *Merrill v. George*, 23 How., 331.

⁵ *Hardenbrook's case*, 8 Abb., 416.

⁶ *Cole v. McClellan*, 4 Hill, 60.

officer, specifying such court or officer, the place of attendance, and the cause in which he shall have been subpœnaed; and 2. That he has not been subpœnaed by his own procurement, with the intent of avoiding the service of any process; which affidavit may be taken by such officer and when so taken shall exonerate such officer from all liability for not making such arrest.¹ Notwithstanding the declaration of the statute that the arrest of a witness made contrary to its provisions shall be absolutely void, it is held that the exemption may be waived by the witness, by willingly submitting himself to the custody of the officer, or by putting in bail, or by a general appearance.²

25. Voters at any election or town meeting are exempt from arrest on the day of such election or town meeting. It is possible, however, that, should an elector be found in any other town than that in which he is entitled to vote, he would not be protected by the language of the statute.³

26. No female shall be arrested in any action except for a willful injury to person, character or property;⁴ and the concealment and disposal of a piano is not a willful injury within the meaning of the Code.⁵ A female cannot be arrested in an action for a breach of promise to marry;⁶ nor for fraudulently contracting the debt on which the action is brought.⁷ A married woman is exempt from arrest in all cases.⁸

27. A person in the custody of the law is exempt from arrest. Thus, where a prisoner has been duly arrested in a civil or criminal case, and is in the custody of the sheriff, whether in jail or upon the limits, he cannot be

¹ 3 R. S. (5th ed.), 685.

² *Stewart v. Howard*, 15 Barb., 26; *Petrie v. Fitzgerald*, 1 Daly, 401.

³ 1 R. S. (5th ed.), 418, § 3, Id. 819, § 22.

⁴ Code, § 179, sub 5.

⁵ *Tracy v. Leland*, 2 Sandf., 729.

⁶ *Siefke v. Tuppy*, 3 Code R., 23.

⁷ *Wheeler v. Hartwell*, 4 Bosw., 684.

⁸ *Anon.*, 8 How., 134; 1 Duer, 613; see, however, *Solomon v. Waas*, 2 Hilton, 179.

arrested or taken out of the custody of the officer upon any subsequent process or execution in a civil or criminal matter, except upon a writ of habeas corpus; and if the officer having him in custody under such first process allows him to be taken out of his custody, he will be liable for an escape.¹ A person under arrest on a justice's warrant is in the custody of the law, and cannot be arrested on subsequent process; if he be so arrested, all persons concerned in the second arrest, with knowledge of the previous arrest, are answerable as for an unlawful act.² But a prisoner under arrest on a criminal charge may be arrested on a civil process, provided leave of the court be first obtained.³ If, while the defendant is in custody on a civil process, any other bailable writ or order for arrest is lodged with the sheriff, he is bound, at his peril, to detain such defendant until he is regularly discharged from the second writ or order.⁴ But, if the first arrest was made without process, or on void process, or after it was returnable, or while the defendant was privileged from arrest, he cannot be detained by virtue of any subsequent process at the suit of the same party.⁵

28. Where one has been arrested and discharged by reason of being temporarily privileged from arrest, as where he is attending the trial of a cause as attorney or party, or as an elector on election day, he may be again arrested by the same officer, on the same order, after the privilege has expired.⁶

29. Should the sheriff refuse to arrest a defendant claiming to be exempt, the burden is on him of showing, in an action against him for such refusal, that the claim of such person to exemption was well founded. The

¹ *Brown v. Tracy*, 9 How., 93.

² *Love v. Humphreys*, 9 Wend., 204.

³ *Williams v. Bacon*, 10 Wend., 636.

⁴ *Sewell*, 108.

⁵ *Graham's Pr.*, 144; *Sewell*, 130.

⁶ *Van Wezel v. Van Wezel*, 1 Edw.

Ch., 113; *Willard v. Sperry*, 1 Wend., 33; *Humphrey v. Cummings*, 5 Wend., 90; *Secor v. Bell*, 18 John., 52; see also *Petrie v. Fitzgerald*, 1 Daly, 401.

sheriff does not render himself liable to an action for arresting any defendant claiming exemption, except ambassadors or other public ministers or their domestic servants, or for refusing to release a witness who has made, or offered to make, the proper affidavit to entitle him to his discharge. The safer course for the sheriff to pursue, except in the cases above stated, is to arrest the defendant and leave him to apply to the court for a discharge. He should, however, not arrest any member of congress, nor any member of the legislature, during the period of their exemption; nor any canal officer, nor any female, unless it appears from the papers in his hands that it is not a case in which they are exempt.¹ In the case of attorneys and counsellors, it is the duty of the sheriff to make the arrest, and to leave them to their application to the court, and for a neglect so to do he will be liable.

30. The arrest may be made at any place within the county to the sheriff of which the order has been delivered. If the party be arrested in any other county than that to the sheriff of which the order has been delivered, he will be discharged;² but on an application for setting aside the arrest on that ground, the defendant must show that the arrest was not made on the border, and that there is no dispute as to the boundaries.³

31. The arrest may also be made upon the premises, or in any building of the defendant or of any other person, or even in the defendant's dwelling house, provided the outer door be open.⁴ But the officer cannot break open the outer door of such dwelling for the purpose of executing the order; and a breaking in such case need not be a violent forcing of the lock or fastening of the door, for if the outer door be latched, it will be a breaking to merely

¹ See Crocker on Sheriffs, § 306.

² 2 B. & Ald., 408; 4 Man. & Sel., 414.

³ 1 Dow., O. S., 24; 3 Barn. & Cres., 158.

⁴ 3 Coke, 92; Cro. Eliz., 909; Hagerty v. Wilbur, 16 John., 287.

unlatch it and enter the house.¹ So, if on rapping or ringing at the door, the door is opened by any person to see who is there, and the officer forcibly rushes in and makes an arrest, the entry and arrest are unlawful; but if, on knocking at the outer door, any proper person appears and invites him into the house, he may lawfully enter and execute the order.² It is a time honored principle of law that every man's house is his castle, and cannot be broken open by process. So that if an officer gain admission by fraud or force, and attempts to make an arrest, the defendant or any person in the house may lawfully resist such attempt.³

32. This privilege attached to a dwelling house protects not only the owner but also his family, including servants, permanent boarders, and all persons who make the house their home. But it does not protect strangers, and persons who flee there to escape the process of the law.⁴ If a stranger is in the house, it is the duty of the owner to open the door, on a proper demand by an officer having process against such stranger, and if he refuse so to do, the officer may lawfully break the door and make the arrest.⁵ But in such case the officer's justification depends wholly upon the fact of the party against whom he has process being found in the house. No matter how recently the defendant may have been there before the entry, nor how reasonable the cause to suspect that he was then in the house, if the fact turns out to be that he was not in the house at the time of the entry and search, the officer will be liable to an action of trespass.⁶

¹ *People v. Hubbard*, 24 Wend., 369; *Curtis v. Hubbard*, 4 Hill, 437; *Glover v. Whittenhall*, 6 Hill, 597, 599, note.

² *Crocker on Sheriffs*, § 312, citing *Impey*, 74.

³ *People v. Hubbard*, 24 Wend., 369; *Curtis v. Hubbard*, 4 Hill, 437;

Glover v. Whittenhall, 6 Hill, 599, note.

⁴ 3 Black. Com., 288; 6 Taunt., 246; *Allen*, 109; 5 Coke, 93.

⁵ *Id.*

⁶ 2 Dow. & Lown, 199; 13 Mees. & W., 52.

33. The privilege is also limited to a dwelling and to the out-houses immediately connected therewith, and which are parcels thereof. The officer may, therefore, break open any store, warehouse or barn, or any building not occupied as a dwelling, nor annexed to a dwelling, nor forming any part of the curtilage. But a demand should be first made.¹ To exempt a building from liability to forceful entry, it must be actually used at the time as a dwelling house. The fact that a man's household goods are in a house will not make it a dwelling unless some one abides therein; and the mere casual use of a tenement as a lodging will not exempt it; as where a servant sleeps in a barn for some nights to watch thieves, or where a party lies in a warehouse to watch goods.² But where the owner has once entered upon the occupation and possession of a dwelling house, by himself or some one of his family, it will not cease to be his dwelling on account of any temporary or occasional absence though no person be left in it. But where the owner is so absent, there must be an intention on his part of returning, for if he has quitted it without any intention of returning and continuing to dwell there, it ceases to be a dwelling.³

34. If the whole of a house is let to lodgers, or tenants, and the owner does not inhabit any part of it, though there is but one door common to all the inmates, yet every separate apartment is the distinct mansion of its respective possessor. But if a man let out part of his house, and himself occupies another part, he is considered in law the occupant of the whole house and an officer having gained admission through the outer door may break the inner doors, having first made a demand.⁴

¹ Haggerty v. Wilbur, 16 John., 287; Hubbard v. Mace, 17 John., 127.

² See Russell on Crimes, §§ 803, 805; also post ch. iv, sec. v, pl. 21.

³ Russell on Crimes, § 805.

⁴ Sewell, 110; Williams v. Spencer, 5 John., 352; Radcliff v. Burton, 3 Bos. & Pul., 223; see Hubbard v. Mace, 17 John., 127; Allen, 423.

35. If any of the outer doors of a dwelling are open the officer may lawfully enter the house and arrest the defendant if found therein; and having peacefully and lawfully entered, he may break open any inner door, room or closet to make such arrest. He should, however, demand that the door, room or closet be opened before breaking it.¹

36. So the protection of a man's house extends to the original arrest only; and where the defendant has been legally arrested, and breaks away, and shuts himself up in his house, the officer is justified in attempting to retake him, in breaking open the outer door without a previous demand and refusal, where the pursuit is fresh and the party consequently aware of his object.² But the better practice is to first make a demand in all cases. Where the arrest is made by the officer putting his hand through an open window and touching the defendant, or where the defendant's hand is out of the window and the officer seizes it, he may break open the outer door to come at such prisoner.³ So, if the arrest be made in the house and the officer be thrust out of it, he may immediately break in without first making a demand.⁴

37. No manual touching of the body or actual force is absolutely essential to constitute a valid arrest. It is sufficient if the party be within the power of the officer and submit to the arrest.⁵ But if he do not submit, mere words, such as "You are my prisoner," or the like, without touching the body, are insufficient and do not amount to an arrest.⁶ However, if an officer enters the room wherein the defendant is and locks the door and says to him "You are my prisoner," the arrest will be good, for

¹ Haggerty v. Wilbur, 16 John., 287; Hubbard v. Mace, 17 John., 127.

² Allen v. Martin, 10 Wend., 300; Glover v. Whittonhall, 6 Hill, 597.

³ 6 Modern, 173.

⁴ Allen v. Martin, 10 Wend., 301.

⁵ Gold v. Bissell, 1 Wend., 215; Allen 96; 1 Backus, 116.

⁶ Russen v. Lucas; 1 Carr & Payne, 153.

the defendant is in his power.¹ The arrest is generally made by an actual seizure of the defendant's body; and any touching, however slight, will amount to a seizure; as where an officer lays his hand on the defendant and says, "I arrest you."² Nor is it necessary that the officer, acting within his county, show the order on which the arrest is made; nor that he inform the defendant at whose suit nor on what process the arrest is made.³ He should, however, immediately serve a copy of the order and affidavits.

38. If the defendant is not within the jurisdiction of the officer holding the order of arrest, such officer cannot make the arrest unless the defendant come voluntarily within such jurisdiction. And, therefore, if the defendant be enticed, by false representations, into the sheriff's bailwick for the purpose of arresting him, an arrest so made will be discharged.⁴

39. Where a party has been legally arrested in one action, and is in custody, he may be detained under orders of arrest obtained at the suit of other plaintiffs.⁵ But if the first arrest was illegal, as where it was made without process or under void process, or by the collusion of the sheriff or parties, he cannot be detained under valid orders already in the sheriff's hands;⁶ nor under a subsequent valid process at the suit of the person by whose instigation he was so arrested, or of any person in any way connected therewith.⁷ So, if he was arrested while privileged from arrest, he cannot upon being discharged be rearrested before he has had time to take any real advantage of his discharge.⁸ So if the defendant has

¹ Watson, 90; Williams v. Jones, Hardwick, 301.

² 1 Backus, 116.

³ Arnold v. Stevens, 10 Wend., 514.

⁴ Goupil v. Simonson, 3 Abb., 474. Carpenter v. Spooner, 2 Code R., 140; 2 Sandf., 717.

⁵ Barclay v. Faber, 2 Barn. & Ald., 743; 1 Chitt. R., 579.

⁶ Pearson v. Yewens, 7 Dow., P. C., 451; Spencer v. Stuart, 3 East., 89.

⁷ *Ex parte* Scott, 9 Barn. & Cres., 446; Att'y Gen. v. Cass, 11 Price, 345.

⁸ Barratt v. Price, 9 Bing., 566; Spencer v. Stuart, 3 East., 89.

been arrested under a criminal process used merely as a pretext, he cannot be detained under an order of arrest obtained by the instigator of such criminal proceeding;¹ but if the criminal charge was made in good faith, he may be detained in a civil action if leave of the court be first obtained.²

40. Having made the arrest, the sheriff must serve upon the defendant copies of the affidavit and order.³ But should he neglect so to do, it will be an irregularity only, and will not entitle the defendant to his discharge. The plaintiff, however, will be required on motion to serve such copy, with the costs of motion.⁴

41. The sheriff must also indorse his return on the order and return it to the person subscribing it within the time limited therein; and he must also file the affidavit with the clerk within ten days after making the arrest.⁵ Should he neglect to make return of the order within the time specified therein, it may be enforced by attachment.⁶

42. After the arrest the sheriff must keep the defendant in custody until discharged by law; that is, until he shall have given the requisite bail or made the necessary deposit; or until the order of arrest shall have been vacated. The practice is, however, where the defendant remains in custody, to allow him the liberties of the jail on his executing a proper bond. So, a defendant is entitled to the liberties of the jail on being surrendered by his bail.⁷

43. The revised statutes provide that: "Every person who shall be in the custody of the sheriff of any county, by virtue: 1, Of any *capias ad respondendum*;" (order of arrest), "or 2, Of any execution in a civil action; or 3, Of any attachment for non-payment of costs in a civil action;

¹ Williams v. Bacon, 10 Wend., 636. Barker v. Cook, 40 Barb., 254; 16 Abb., 83; 25 How., 190.

² Lucas v. Albee, 1 Denio, 667.

³ Code, § 184.

⁴ Keeler v. Belts, 3 Code R., 183;

⁵ Code, § 192; Sup. Court, rule 7.

⁶ Sup. Court, rule 8.

⁷ See 3 R. S. (5th ed.), 733; Santos v. Merceanes, 9 How., 188.

or 4, In consequence of a surrender in exoneration of his bail; shall be entitled to be admitted to the liberties of the jail which shall have been established in such county according to law upon executing a bond to such sheriff and his assigns."¹ Such bond shall be executed by the defendant, with one or more sufficient sureties, being householders of the county in a penalty of not less than double the sum named in the order of arrest, or in the execution or attachment.² And it shall be conditioned that the defendant shall remain a true and faithful prisoner, and shall not at any time or in any manner escape or go without the limits and boundaries of the liberties established for the jail of such county until discharged by due course of law.³ (See form No. 37).

44. The sheriff is primarily liable for the escape of the prisoner, and it is his right and duty to require the most ample security before allowing the defendant the liberties of the jail. Should he discover after such bond is taken, that any surety thereto is insufficient, he may recommit the prisoner to close confinement in the jail until other good and sufficient sureties be found.⁴ The conditions of the bond should conform substantially to the terms of the statute or it will be void.⁵ But if the bond is in due form it shall be valid and shall be held for the indemnity of the sheriff, and of the party at whose suit the prisoner shall be confined.⁶

45. The sureties in such bond may surrender their principal at any time before judgment shall be rendered against them on such bond, but they shall not be thereby exonerated from any liability incurred before making such surrender.⁷ To effect such surrender their bail may take their principal to the keeper of the jail, and upon

¹ R. S. (5th ed.), 733.

² Id.

³ Id.

⁴ Id.

⁵ Sullivan v. Alexander, 19 John., 233.

⁶ R. S. (5th ed.), 733.

⁷ Id.

the written requirement of such bail, the keeper shall take the prisoner into custody, and shall thereupon indorse upon the bond an acknowledgment of such surrender; he shall also, if required, give the bail a certificate acknowledging such surrender.¹ If the keeper refuse to take the defendant into custody, when properly required so to do, the sureties will be discharged.² (See forms Nos. 38, 39).

46. The going at large of any prisoner who shall have executed such bond or of any prisoner who would be entitled to the liberties of any jail upon executing such bond, *within* the jail liberties of the county where he is in custody, shall not be deemed an escape. But in case any such prisoner shall go at large without the liberties of such county, without the assent of the party at whose suit he is in custody, it shall be deemed an escape, and a forfeiture of the bond so executed; and the sheriff in whose custody such prisoner shall have been, shall have the same authority to pursue and retake such prisoner, as if such escape had been made from the jail. The retaking such prisoner, and his giving a new bond does not take away the sheriff's right of action against the sureties on the first bond, in consequence of his having been sued for an escape. But it is a good defense to a suit upon the bond, that the prisoner was retaken, or surrendered himself before suit.³

47. The keeper of every jail to whom a certified copy of the minutes of the county court, establishing the liberties of such jail, shall be delivered, shall keep the same exposed to public view, in some open and public part of such jail; and it shall be the duty of such jailer to exhibit the same to every person who shall be admitted to the liberties of such jail, at the time of executing the bond for the liberties.⁴

¹ 3 R. S. (5th ed.), 733, 734.

² Babb v. Oakley, 5 Cal., 93.

³ 3 R. S. (5th ed.), 734.

⁴ Id. 733.

But a person who has given security for the liberties of the jail is bound, at his peril, and at the risk of his sureties, to keep within the liberties; and though the limits established by the court are in any part vague and indefinite, it is the duty of the prisoner to keep in places clearly defined and within the limits; for he is bound to know and observe the limits. It is not the duty of the sheriff to ascertain the bounds of the liberties.¹

¹ Kip v. Brigham, 7 John., 167.

SECTION XI.

BAIL, HOW GIVEN.

- | | |
|--|---|
| 1. § 186. Defendant to be discharged on bail or deposit.
2. § 187. Bail, how given.
3. § 194. Qualifications of bail.
4. When bail may be given.
5. Bail for arrest under sub 3 of § 179.
6. Bail may be given before arrest.
7. To whom the undertaking should be given.
8-9. Concerning the qualifications of bail. | 10. What species of property will qualify.
11. Common law disqualifications.
12. Members of congress and of the legislature.
13. Officers of courts cannot be bail.
14. Attorneys and their clerks.
15. Other persons who are disqualified.
16. Undertaking to be acknowledged — How disposed of. |
|--|---|

1. "The defendant at any time before execution shall be discharged from arrest, either upon giving bail, or upon depositing the amount mentioned in the order of arrest, as provided in this chapter."¹

2. "The defendant may give bail, by causing a written undertaking to be executed by two or more sufficient bail, stating their places of residence and occupations to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he be arrested for the cause mentioned in the third subdivision of section 179, and undertaking to the same effect as that provided by section 211."²

3. "The qualifications of bail must be as follows:
 1. Each of them must be a resident and householder or freeholder within the state. 2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge or a justice of the peace, on justification, may allow more than two

¹ Code, § 186.

² Code, § 187.

bail, to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.”¹

4. Where the defendant is in custody, bail may be put in at any time, even after verdict or final judgment, provided he has not been charged in execution; under execution the plaintiff's remedy ceases of course to be provisional and becomes absolute.² The bail required by this section is a substitute for the special bail of the former practice, and in many respects subject to the same rules.³

5. It must be observed that, while the ordinary cases of arrest are satisfied with bail that the defendant shall render himself amenable to the process and judgment of the court, an arrest for any cause mentioned in subdivision third of section 179, can only be superseded by an undertaking to deliver the property to the plaintiff if adjudged and also to pay any judgment that may be recovered.⁴ But unless the case is brought clearly within the terms of the subdivision, the court will not enforce it, but will only require the more ordinary security.⁵ For form, see appendix No. 17).

6. It is not essential to the validity of the proceeding that the sheriff personally arrest the defendant before taking bail, for it will be good though no arrest be made.⁶ So it may be taken before the writ or order is delivered to the sheriff for execution, but not before it is issued.⁷ In relation to an undertaking given in an attachment suit by the defendant, to procure the discharge of the goods seized, it was held, that it was not essential to the validity of the undertaking that the plaintiff should

¹ Code, § 194.

² 1 Burrill's Prac., 109, and cases.

³ Stewart v. Howard, 15 Barb., 26; In re Taylor, 7 How., 212.

⁴ Code, §§ 187, 211; Van Nest v. Conover, 5 How., 148.

⁵ Pike v. Lent, 4 Sandf., 650; Mulvey v. Davison, 8 How., 11.

⁶ Graham's Pract., 145.

⁷ Watson, 88.

compel its execution by actually suing out an attachment and making a levy; and that if they chose, the parties could waive the issuing of an attachment and a seizure of goods under it, and the defendant give and the plaintiff accept such an undertaking as the defendant would have been required to give on an application to discharge an attachment actually issued.¹ From the analogy of the two proceedings, the principles of the latter decision should be equally applicable to an undertaking of bail taken under like circumstances.

7. The Code does not designate to whom the undertaking should be given, and the usual course is to give it generally without naming any one as obligee. It will be valid, however, if given in the name of the plaintiff in the action.² Where the bail is taken by the sheriff, he must confine himself strictly to the authority conferred by the statute; but where the defendant is discharged from arrest by the plaintiff in the action, such plaintiff may take any security he pleases.³

8. Each of the bail must be a resident and householder or freeholder within the state. The question as to who are, and who are not residents will be fully discussed hereafter under the subject of attachment.⁴ A householder is the occupier of a house, or more correctly one who keeps house with his family; the head or master of the family, one who has a household, or who is the head of a household.⁵ A "freeholder" is the owner of an estate of inheritance, or for life, in real property, whether it be a corporeal, or an incorporeal hereditament.⁶ The ownership of a freehold in any part of the state will meet the requirements of the Code.⁷

¹ Coleman v. Bean, 32 How., 370.

² Slack v. Heath, 4 E. D. Smith, 95.

³ See Decker v. Judson, 16 N. Y. R., 439.

⁴ See post ch. iv, sec. i, pl. 13-20.

⁵ Burrill's Law Dic., "Householder."

⁶ 4 Kent's Com., 24.

⁷ Hoff. Pro. Rem., 74.

9. Each bail must also be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge or justice of the peace, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail. The affidavit attached to the undertaking should include the statement that each of the bail is worth the sum specified over and above all debts and liabilities.

10. The species of property, in respect to which the bail derives his qualification is immaterial; but it must be in his own right, and within the jurisdiction of the court,¹ for the Code evidently precludes a property qualification, where the property is without the state.²

11. There are certain common law disqualifications of bail which remain unaffected by the Code,³ and of which the court will take judicial notice, although such bail be unopposed.⁴ But if persons disqualified for bail execute the undertaking, the plaintiff cannot treat it as a nullity; if he would take advantage of the disqualification, he must except to the bail, and they will be rejected on justification.⁵

12. By the English law, members of the house of commons are disqualified for bail from the time of their election until the prorogation or final dissolution of parliament;⁶ but the question as to whether members of congress and of the legislature are disqualified, seems never to have been decided here.

13. The officers of the different courts of justice, except justices of the peace, are disqualified.⁷ Hence the judges,⁸

¹ Til. & Sher. Pr., vol. 1, 586; and cases.

² Hoff. Pro. Rem, 75.

³ Wheeler v. Wilcox, 7 Abb., 73; Miles v. Clark, 2 Bosw., 709; Aff., 4 id., 632.

⁴ 3 Dow., 110.

⁵ Miles v. Clark, 2 Bosw., 709.

⁶ Petersdorf on Bail, 49.

⁷ Graham's Pr. (3d ed.), 574.

⁸ Earl of Leicester v. Mandy, 2 Sid., 31.

and clerks¹ of any court, all sheriffs and their officers,² jailors, turnkeys, etc.,³ and all persons indemnified by any of them, are ineligible as bail in a civil action.⁴

14. An attorney is likewise disqualified, even though not in active practice; and the rule is general in its application and not limited to cases in which he is engaged.⁵ But if he has been long out of practice he will be qualified.⁶ This disqualification extends to an attorney's clerk, except as bail for his employer;⁷ and it has even been extended to an attorney's partner, though not himself an attorney.⁸ Persons indemnified by an attorney are also disqualified, as otherwise, it would be a mere evasion of the above rule.⁹

15. A person of infamous character where such infamy would disqualify him as a witness, is incompetent.¹⁰ But the mere fact that the bail is the keeper of a gambling house, or brothel, is no valid objection, regard being had more to the sufficiency of the property of the bail, than to his moral character.¹¹ Persons who have been once rejected,¹² except when such rejection was on account of their being indemnified by an attorney;¹³ persons liable for outstanding dishonored bills;¹⁴ or who have compromised their debts but are again in debt;¹⁵ or who profess ability to pay their debts but are unwilling so to do;¹⁶ a son who allows his father to receive relief from the county;¹⁷ or a

¹ *Payne v. Fry*, 1 Strange, 546.

² *Bailey v. Warden*, 20 John., 129.

³ *Daley v. Brooshoft*, 2 Brod. & Bing., 359; but see 2 Bosw. & Pul., 150.

⁴ 1 Chitt. Archb. (7th ed.), 601; but see 1 Chitt. Rep., 714, note.

⁵ *Miles v. Clark*, 2 Bosw., 709; 4 id., 632; *Wheeler v. Wilcox*, 7 Abb., 73; *Coster v. Watson*, 15 John., 535.

⁶ *Rex v. Sheriff of Surrey*, 2 East., 182; *Bell v. Gate*, 1 Taunt., 162.

⁷ *Dixon v. Edwards*, 2 Anstr., 356;

Laing v. Cundall, 1 Hen. Black., 76.

⁸ *Matter of Yates*, 1 Dow. & Ryl., 9.

⁹ *Peters. on Bail*, 281; *Capon v. Dillamore*, 1 Bing., 423.

¹⁰ *Rex v. Edwards*, 4 T. R., 440.

¹¹ 1 Dow., P. C., 160; 3 id., 320.

¹² 3 Petersd. Abr., 103.

¹³ 1 Dow. & Ryl., 488.

¹⁴ *Anon.*, 1 Dow., P. C., 183.

¹⁵ 3 Petersd. Abr., 111.

¹⁶ Id., 112.

¹⁷ *Holm v. Booth*, 2 Chitt. R., 78.

father who suffers his children to live in a work-house,¹ have all been held by the English courts disqualified.

16. The undertaking of bail must be proved or acknowledged in like manner as deeds of real estate, before it will be received or filed,² but any defect in this respect may be remedied by amendment on motion.³ When completed, the undertaking must be delivered to the sheriff, who will thereupon release the defendant, provided the undertaking is in proper form and the sureties therein are competent. Otherwise the sheriff may refuse the bail and retain the defendant in custody. If the bail is given before the return of the order of arrest, the sheriff must deliver a certified copy of the undertaking of bail to the plaintiff or attorney by whom the order is subscribed, at the time of making return of such order.⁴ The original undertaking of bail remains in the hands of the sheriff, until the justification. When the justice before whom the justification is had, is to annex the examination to the undertaking, indorse his allowance thereon, and cause the same to be filed with the clerk.⁵ (For form of undertaking, see appendix No. 16.

¹ Anon., 2 Chitt., 77.

² Sup. Court, rule 6.

³ Conklin v. Dutcher, 5 How., 386.

⁴ Code, § 192.

⁵ Code, § 196.

SECTION XII.

JUSTIFICATION OF BAIL.

- | | |
|--|---|
| 1. § 192. Delivery of undertaking to plaintiff and its acceptance or rejection by him.
2. Notice of non-acceptance.
3. § 193. <i>Notice of justification: new bail.</i>
4. Notice of justification, what to contain.
5. Time when justification to be made.
6. Before whom justification may be made.
7. Notice of exception extends to new bail.
8. § 195. <i>Justification of bail.</i> | 9. Opposition to bail; when time allowed to get new bail.
10. Failure of justification.
11. Proceedings on justification.
12. When to take place.
13. Effect of a failure to justify.
14. Qualifications of bail.
15. Plaintiff to procure certificate of failure of justification.
16. § 196. <i>Allowance of bail.</i>
17. Disposition of undertaking.
18. Allowance of bail conclusive. |
|--|---|

1. "Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the plaintiff, or attorney by whom it is subscribed with his return indorsed, and a certified copy of the undertaking of the bail. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted it and the sheriff shall be exonerated from liability."¹

2. If the plaintiff is satisfied with the bail given, nothing more need be done on his part; but if he be not satisfied with such bail, his only remedy is to serve the notice as above provided. He cannot treat bail as a nullity, although he knows them to be incompetent or disqualified. He can only object to them in the manner prescribed.² The plaintiff's notice should be in writing and should be entitled in the cause; but any defect or irregularity in such notice will be deemed to be waived

¹ Code, § 192.

² See *Miles v. Clarke*, 4 Bosw., 632; 2 id., 709.

by the defendant's giving notice of justification.¹ (See forms, No. 18).

3. "On the receipt of such notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or attorney by whom the order of arrest is subscribed, notice of the justification of the same or other bail (specifying the places of residence and occupation of the latter) before a judge of the court, or county judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bail be given there shall be a new undertaking in the form prescribed in section 187."² The words "justice of the peace" were formerly in the section after the words "county judge," but were stricken out in 1851.

4. The notice of justification should be entitled in the action and should carefully state every fact required, by the foregoing section, to be therein stated. The time and place of the justification and the officer before whom it will be made; and, where new bail is given, their names, places of residence and occupation should all be set forth with precision, as any misdescription by which the plaintiff is misled would render the notice defective.³ Where the bail live in a large village, or a city, their residence should be specified by street and number. The place of justification must be within the county where the defendant was arrested, or where the bail reside.⁴ And it is probable that a notice of justification given for the wrong county, would be a nullity unless the plaintiff waived the objection by appearing or otherwise. (See forms, Nos. 19, 20).

5. The time at which the justification is to be made, is to be not less than five nor more than ten days from

¹See *Rogers v. Mapleback*, 1 H., R., 88; *Brown's Bail*, 5 Dow. P. Blacks., 106.

²Code, § 193.

³*Coleman v. Roberts*, 1 Chitty,

C., 220.

⁴Sup. Court, rule 5.

the service of the notice on the plaintiff. But such time may be extended beyond the limits prescribed in the notice, on good cause shown; an order must, however, be duly obtained to that effect, and a new notice of justification given.¹ So the time in which the notice of justification is to be served, may be extended on motion for good cause.² (See forms Nos. 21, 22).

6. The justification can only take place before a judge of the court in which the action is pending, or a county judge. An inadvertence or blunder in amending the Code, has led many into the error of supposing that the justification could be made before a justice of the peace. By the amendment of 1851 the words "or justice of the peace" were stricken out of section 193. So that the justification cannot be noticed before a justice of the peace; and although the words are retained in sections 194, 195, 196, they become inoperative.

7. Where, after notice of exception, the defendant serves notice of the justification of new bail, the exception to the first bail extends to those substituted and they must justify. If new bail is given, a new undertaking must be entered into.³

8. "For the purpose of justification, each of the bail shall attend before the judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency in such manner as the judge, or justice of the peace, in his discretion may think proper. The examination shall be reduced to writing, and subscribed by the bail if required by the plaintiff."⁴ /

9. Opposition to the bail is usually made on the ground either of some defect or irregularity in the form of the undertaking, or of the notice, or the service of the notice

¹ Burns v. Robins, 1 Code R., 62.

² Tidd's Prac., 272; Code, § 405.

³ § 193, *supra*.

⁴ Code, § 195.

of justification, or that the bail are not properly qualified. Under the former practice, if the bail did not attend to justify at the time appointed, and no further time was given they were said to be out of court. But further time was sometimes given, either to justify the same bail or to add and justify others.¹ Thus, if they were prevented from justifying by circumstances happening after they were put in, as by their subsequent bankruptcy, or insolvency, or by their having given up housekeeping, further time would usually be allowed to add and justify other bail.² So, further time was generally given, where the bail, from any unforeseen accident, could not attend;³ or if after notice of justification they refused to attend;⁴ or if one or both of them failed to justify, by reason of the decision of the court upon a doubtful point of law as to their right to justify.⁵ But, where bail offered themselves, and were rejected on account of some personal insufficiency, existing at the time they were put in, as by their being then attorneys;⁶ or insolvent debtors, or by their not being then housekeepers, time would seldom be allowed to add and justify others.⁷ Leave to extend the time and to add other bail must be obtained from the court on affidavits setting forth the facts. (See forms Nos. 21, 22).

10. On receiving notice of the justification, it becomes the duty of the plaintiff to attend at the time and place therein mentioned, unless there is some irregularity in the notice, and if he fails so to do, the bail will stand perfected and the sheriff discharged. The absence of the plaintiff is a waiver of his objection, even though the sureties themselves fail to attend.⁸ Should the sureties fail, from

¹ Tidd's Pr., 272.

² 1 Chitty R., 11; *id.*, 3, 4, 6; 1 Tidd's Pr., 273, 297.

³ 2 Chitty R., 107.

⁴ 1 Arch. Pr., 113.

⁵ 1 Chitty R., 287; 1 Arch. Pr., 193.

⁶ 1 Chitty R., 8.

⁷ 1 Chitty, 788, 144; 1 Tidd's Pr., 287; see Voorhies Code, 382, citing the above cases.

⁸ See *Ballard v. Ballard*, 18 N. Y., R., 491.

any cause, to be present and justify, the sheriff will remain liable. So, a failure to justify on the part of either surety amounts to a failure of the justification; and a rejection of one of the bail was, usually, under the former practice, a rejection of all, unless time was given to procure others.¹ The judge may allow others to be substituted for the defaulting surety; but a new undertaking would be required, and the new bail must attend on new notice, and complete the justification.

11. The examination of the bail is under oath; and is in the nature of a cross-examination, based upon the affidavits of sufficiency attached to the undertaking.² Considerable latitude should be allowed in the examination, that the officer may be satisfied, beyond a doubt, of the sufficiency of the security. Should the plaintiff omit to attend, the affidavits of sufficiency will be sufficient to authorize an allowance of the bail without examination.³ (See forms No. 23).

12. The justification must take place in the county where the defendant was arrested, or where the bail reside; and must be before a judge of the court, or county judge. A justice of the peace has no jurisdiction in the matter.⁴

13. If the bail are excepted to and fail to justify, they cease to be bail and are entitled to an exonereter; to take effect from the exception, or from the expiration of the time to justify, if there is no waiver of the exception before that period.⁵ The undertaking is in the nature of a contract with the plaintiff in the action, and it is optional with him to accept it or not. Should he refuse to accept it, it ceases to have any effect, unless the bail justify in

¹ *Lewis v. Gadderer*, 5 Barn. & Ald., 704.

² 1 Bur. Prac., 401; *Van Wezel v. Van Wezel*, 3 Paige, 38; *Laporte's Bail*, 3 Dow., 110.

³ *Hoff. Pro. Rem.*, 78.

⁴ See *supra*, pl. 6.

⁵ *People v. N. Y. Sup. Court*, 20 Wend., 607, and cases.

the manner prescribed. Where the plaintiff refuses to accept the bail and they fail to justify, their only liability is that given by section 203, in an action by the sheriff, not on the contract, but for damages which he may have sustained by reason of their omission or neglect.¹ The plaintiff may waive his objections to the bail, provided it be done before the time for justification has expired; afterwards a waiver would be useless as the contract is at an end.²

14. The qualification of bail has been before treated of.³ They must each be resident freeholders, or householders within the state, and worth the amount specified in the order of arrest, exclusive of property exempt from execution; unless more than two bail justify, in which case the bail may justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.⁴ The following persons are disqualified for becoming bail: All officers of courts of record, including judges, clerks of courts, sheriffs and their officers, turnkeys, jailors, etc.; also attorneys, attorneys' partners and clerk, and all persons indemnified by an attorney; persons who have been once rejected as bail, and all persons of infamous character.⁵

15. In case the bail fail to attend at the time and place of justification, or if on examination the justification proves insufficient, a certificate of the fact should be obtained by the plaintiff from the judge or officer, in order to the establishment of the sheriff's liability, if necessary.⁶

16. If the judge or justice of the peace find the bail sufficient, he shall annex the examination to the undertaking, indorse his allowance thereon, and cause the

¹ Clapp v. Schutt, 44 Barb., 9; People v. N. Y. Superior Court, 20 Wend., 607.

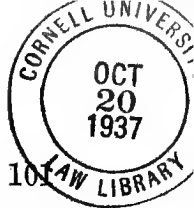
² People v. N. Y. Superior Court, 20 Wend., 607.

³ See supra, p. 101.

⁴ Code, § 194.

⁵ See ante p. 101.

⁶ 1 Whitt. Pr., 429.



same to be filed with the clerk; and the sheriff shall thereupon be exonerated from liability.¹ (See forms Nos. 24-25).

17. Where the bail is found to be sufficient the judge must comply strictly with the foregoing section, as the justification will not be completed until he shall have done so, and shall have indorsed his allowance on the undertaking and filed it with the clerk.² The undertaking passes out of the possession of the sheriff into that of the clerk, in whose custody it shall thenceforth remain, subject to the direction of the court.

18. When once the justification has been completed and the bail allowed, the matter is concluded, and the justification cannot be opened on the ground of the subsequent insolvency of the sureties. The discharge of the sheriff is absolute.³ But the allowance of bail has been set aside on motion, when obtained through gross fraud on the part of the bail, and *with* knowledge in the defendant or his attorney. But not when such fraud was committed without the knowledge of the defendant or his attorney.⁴ (For forms on justification, see appendix Nos. 18 to 26).

¹ Code, § 196.

² O'Neil v. Durkee, 12 How., 94.

³ See Dudley v. Goodrich, 16 How., 189; Willett v. Stringer; 6 Duer, 686; 15 How., 310.

⁴ 1 Till & Sher Pr., 589, citing: 1 Chitt., R., 372; id., 143; 5 J. B. Moore, 321; 2 Br. & B., 619; 5 Taunt., 776; but see 1 Bing., 365, 2 Dow., P. C., 438.

SECTION XIII.

DEPOSIT INSTEAD OF BAIL.

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| 1. § 197. Deposit with the sheriff.; | 7. Money deposited at the risk of the depositor. |
| 2. § 198. Payment of deposit into court. | 8. Attaching the deposit in another suit. |
| 3. § 199. Substituting bail for deposit. | 9. Application of the money in satisfaction of judgment. |
| 4. § 200. Deposit, how disposed of. | 10. When money to be returned to depositor. |
| 5. Deposit after bail has been given. | |
| 6. Duty of sheriff on receiving deposit. | |

1. "The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody." ¹

2. "The sheriff shall, within four days after the deposit, pay the same into court, and shall take from the officer receiving the same, two certificates of such payment, the one of which he shall deliver to the plaintiff and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency." ²

3. "If money be deposited as provided in the last two sections, bail may be given and justified upon notice, as prescribed in section 193, any time before judgment, and thereupon the judge before whom the justification is had shall direct, in the order of allowance, that the money deposited be refunded by the sheriff to the defendant, and it shall be refunded accordingly." ³

4. "Where money shall have been so deposited, if it

¹ Code, § 197.

² Code, § 198.

³ Code, § 199.

remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction thereof; and, after satisfying the judgment, shall refund the surplus if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unapplied.”¹

5. Whether the words “at the time of his arrest,” in section 197, are to be construed strictly or not, does not appear to have been decided. There would seem to be no reasonable objection to allowing the deposit to be made, after bail had been given, and thereby relieve the bail.

6. It is the duty of the sheriff, upon receiving the deposit, to discharge the defendant, without any order of the court; and he must carefully comply with the provisions of the foregoing sections. He is to pay the money into court within four days after the deposit, by paying it to the clerk of the court. Should he make default in payment, proceedings may be had on his official bond, to collect the sum deposited; ² and it is probable that he could be proceeded against summarily, to compel such payment according to the statute.³ (See forms Nos. 26, 27).

7. The money deposited is at the risk of the depositor, and should it become lost or stolen during the pendency of the action, and without any fault of the plaintiff, the defendant must bear the loss.⁴ Where a person arrested, while privileged from arrest, made a deposit to obtain his release, and afterwards made application to the court, the money was ordered to be restored to him absolutely.⁵

¹ Code, § 200.

² See *supra*, § 198.

³ 2 R. S., 534.

⁴ *Parsons v. Travis*, 5 Duer, 650; see 2 Wend., 78.

⁵ *Pitt v. Coombs*, 4 Nev. & Man., 535.

And where a third party deposited money in behalf of an arrested person, who afterwards surrendered himself, the depositor was allowed to take the money back, the surrender being held equivalent to bail.¹

8. In one instance where money was deposited by a party under arrest, and bail afterwards perfected, and the usual order of restitution made, it was held that the money so deposited was liable to attachment before such restitution, in another suit against the same defendant; notwithstanding it was shown that the money belonged to a third party, and not to the defendant.² But this decision is said to have been reversed on appeal.³

9. By the English practice, under similar provisions, the plaintiff, on obtaining judgment, is bound to resort to the fund on deposit in the first instance, and cannot pass that by and issue execution for the whole amount of the judgment.⁴

10. If judgment is obtained in favor of the defendant, he will be entitled to all the money deposited, unless some portion of it has been used in satisfaction of interlocutory orders, entered in the action in favor of the plaintiff. (For forms on deposit, see appendix Nos. 26, 27).

¹ Douglass v. Stanborough, 3 Adol. & Ellis, 316.

² Salter v. Weiner, 6 Abb., 191.

³ See Voor. Code, note to § 200, also 1 Til. & Sher., 594.

⁴ Lush's Prac., 540, and cases.

SECTION XIV.

SURRENDER OF DEFENDANT — ACTION AGAINST BAIL.

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|---|--|
| <ol style="list-style-type: none"> 1. § 188. Surrender of defendant. 2. § 189. Surrender of defendant. 3. Seizure of defendant by his bail, when and where made. 4. Authorizing another to seize defendant. 5. When the sheriff becomes bail may surrender defendant. 6. At what time bail may make surrender. 7. § 190. <i>Bail, how proceeded against.</i> | <ol style="list-style-type: none"> 8. When liable. 9. What bail may show in defense of action. 10. What they may not show. 11. May show collusion between plaintiff and defendant; may defend suit against principal. 12. Where there are several defendants. 13. Bail liable for costs on appeal. |
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1. "At any time before a failure to comply with the undertaking, the bail may surrender the defendant, in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner :

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and shall, by a certificate in writing, acknowledge the surrender.
2. Upon the production of a copy of the undertaking and sheriff's certificate, a judge of the court, or county judge, may, upon a notice to the plaintiff of eight days, with a copy of the certificate, order that the bail be exonerated ; and, on filing the order, and the papers used on said application, they shall be exonerated accordingly. But this section shall not apply to an arrest for the cause mentioned in subdivision 3 of section 179, so as to discharge the bail from an undertaking given to the effect provided by section 211."¹ The concluding words, "so as to discharge the bail, etc.," were added in 1851.

2. "For the purpose of surrendering the defendant, the

¹ Code, § 188.

bail, at any time or place, before they are finally charged, may themselves arrest him; or, by a written authority, indorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so." ¹

3. One let to bail in a civil case, is, in the theory of the law, in the custody of his sureties, who are considered as his keepers. Such sureties may seize their principal at any time or in any place, and surrender him in their own exoneration. They may take him at any time of the day or night, either upon a week day or Sunday, at any place, whether within the county where let to bail, or in another county, or even in another state or country. He may be seized even in church, or while he is attending court as a suitor; and his dwelling ceases to be a castle to him, for his bail have as much a right to go into his house as he himself, and when they please to take him, and if entrance is refused, they may break open his doors to come at him. If the principal resides in the house of another, the bail may enter, if the door is open, to seek for him, whether he is found there or not. And the executor or administrator of the bail may, in like manner, surrender the principal of the deceased. In making the arrest, and in surrendering their principal, the bail may command the cooperation of the sheriff or any of his officers.²

4. The bail may, also, by a written authority, indorsed upon a certified copy of the undertaking, deputize any person of suitable age and discretion to seize the defendant; and such person will have the same powers in respect thereto as the bail themselves.³ Where a sheriff or other public officer is so authorized, he acts simply as agent for

¹ Code, § 189.

² Crocker on Sheriffs, § 182; citing 2 Hill, 218; 7 John., 147; 1 John. Ch., 413; 6 Mod., 231; 2 H. Black, 120; 1 Bos. & Pul., 62; 8 Pick.,

138; Barb. Cr. Law, 583; see Metcalf v. Stryker, 31 N. Y. R., 255.

³ Harp v. Osgood, 2 Hill, 218; Nicholls v. Ingersoll, 7 John., 144.

the bail, and not in an official capacity; and any note or agreement taken by such agent, conditioned for the appearance of the prisoner at the proper court, is not within the statute against the taking of security *colore officii* by a public officer.¹ Such agent may, like the bail, arrest the defendant out of the county or state; and, after a demand, may break open the outer door of his residence, and arrest him, even on a Sunday.² Bail may surrender the defendant even though they have been excepted to, and have failed to justify; and in any case it is not necessary for all the bail to join in the surrender, or to sign the authority empowering another to arrest the defendant.³ (See forms No. 31.)

5. Where the sheriff becomes bail by force of section 201, he is entitled to the same rights and privileges as other bail, and may surrender his principal by rearresting him. No special process is necessary to enable him to make that arrest, but it may be in the same manner and within the same time as arrests by other bail.⁴

6. The bail may make the surrender at any time within twenty days after the commencement of an action against them, or within such further time as may be granted by the court.⁵ By the English rule, further time will not in general be granted to make the surrender. But the indulgence will sometimes be granted in cases where a refusal would work extreme injustice.⁶ Such relief is discretionary with the court, and will not be granted where there is connivance or *laches* on the part of the sureties.⁷ The application for an extension of time should be made before the twenty days have expired, but the

¹ Harp v. Osgood, 2 Hill, 218.

Buckman v. Carnley, 9 How., 180.

² Nicholls v. Ingersoll, 7 John., 145.

⁵ See Code, § 191.

³ In re Taylor, 7 How.; 212, per Humphrey, county judge.

⁶ Petersdorf on Bail, 403; Harris v. Glors, 2 Chitty R., 101.

⁴ Seaver v. Genner, 10 Abb., 256;

⁷ See Baker v. Curtis, 10 Abb., 279.

court has authority to make such extension even after the expiration of the twenty days.¹ Where, however, the bail apply for leave to surrender after the expiration of the legal period, they should be required to show that they are not indemnified by their principal.² After the twenty days, the bail cannot surrender their principal, nor can the sheriff hold him, if surrendered, without the order of the court.³

7. "In case of failure to comply with the undertaking, the bail may be proceeded against by action only."⁴

8. By the practice under the revised statutes, and which is mainly applicable under the Code, the bail could not become charged, or liable to an action, until an execution against the property of the defendant had been duly issued and returned unsatisfied in whole or in part, and an execution against the defendant's body issued and returned that the defendant could not be found within the county.⁵ But it must be observed that this would not apply where the arrest was under subdivision three of section 179.

9. And by the same statute it was provided that in such action, the bail may plead that execution against the property and against the body of the defendant in the original suit, were not issued as herein directed; or that they were not issued in sufficient time to enable the sheriff to execute the same; or that directions were given by the plaintiff, or his attorney to prevent the service of said writs, or either of them; or that any other fraudulent or collusive means were used to prevent such service; and that if any such defense be established it shall entitle the bail to a verdict.⁶ The fraudulent or collusive means intended, must

¹ Gilbert v. Bulkley, 1 Duer, 668; Baker v. Curtis, 10 Abb., 279.

² Bank of Geneva v. Reynolds, 20 How., 18; 12 Abb., 81.

³ Baker v. Curtis, 10 Abb., 279.

⁴ Code, § 190.

⁵ 3 R. S. (5th ed.), 664, § 29;

Pearsall v. Lawrence, 3 John., 514.

⁶ 3 R. S. (5th ed.), 665, § 31.

be chargeable to the plaintiff or his attorney, or it will form no defense, for the misconduct or neglect of the sheriff, not shown to be caused by the plaintiff or his agent, is not enough.¹

10. But in an action on the undertaking, the bail cannot question the liability of their principal to arrest. They are estopped by their undertaking. Exemption from arrest is a personal privilege which may be waived by the defendant, but the sureties cannot avail themselves of it.² Nor can they defend on the ground of the illegality of the order of arrest, or that no *ca. sa.*, could issue upon the judgment; their only remedy being to move for an exoneration to be entered on the bail piece or undertaking, upon surrender of the judgment debtor.³ Nor will the sureties, in general, be allowed to show that the practice or proceedings in the action, in which the defendant was arrested, were irregular. These will be corrected on motion.⁴ Nor can they show either in bar of the action or in mitigation of damages, that before the recovery of judgment against their principal, he was, and has since been utterly insolvent, and had no property whatever that could be or was liable to be applied toward the payment of the judgment.⁵

11. But the bail may show in defense of an action against them, that the plaintiff agreed with the defendant in the original action, without the knowledge of such bail, that he might leave the state and that all proceeding should be staid until his return; and such defense will discharge the bail.⁶ The bail may also be allowed to defend the action against their principal.⁷

12. Where the plaintiff has the right to take the per-

¹ Bradley v. Bishop, 7 Wend., 352; Bishop v. Earle, 17 Wend., 316.

² Gregory v. Levy, 12 Barb., 610; 7 How., 37; see Haggart v. Morgan, 5 N. Y. R., 428.

³ Id.

⁴ Jewett v. Crane, 35 Barb., 208.

⁵ Levy v. Nichols, 19 Abb., 282.

⁶ Niblo v. Clark, 3 Wend., 24; Aff'd 6 Wend., 236.

⁷ Id.

sons of several defendants in satisfaction of his judgment, it carries with it the right to proceed against the bail of one of them, as to whom there may be a return of *non est inventus*.¹

13. The bail are liable not only for the amount of the judgment recovered against their principal on the trial, but also for costs, etc., adjudged against him on his appeal. And an action and recovery against them by the plaintiff for the amount due upon the first judgment, even though satisfied by them, is not a bar to a new action for the amount awarded against their principal on appeal.²

¹ Penn v. Remsen, 24 How., 503.

² Appleby v. Robinson, 44 Barb., 316.

SECTION XV.

EXONERATION OF BAIL.

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| 1. § 191. Bail, how exonerated.
2-3. By the death of the defendant.
4. When death of principal will be presumed.
5. By the imprisonment of defendant.
6. By a judgment for the defendant.
7. Where the principal has obtained discharge from his debts. | 8-9. By a surrender of the principal.
10. Extending time to surrender.
11-12. What is good excuse for not surrendering within the time.
13. What papers should be presented on motion for exoneration.
14. Order of exoneration and papers to be filed. |
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1. "The bail may be exonerated either by the death of the defendant, or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court."¹ The words "or by his imprisonment in a state prison" were added in 1849.

2. It was provided by the revised statutes that where the defendant in a suit shall die after the return of the execution against his body and before the expiration of eight days from the return of the process served on his bail, the court shall relieve such bail, on the same terms as if they had surrendered their principal at the time of his death.²

3. This provision is still in force and not repealed by the Code. There is no longer a "return of process," in the sense used in that statute, but the expiration of the twenty days to answer, or to appear, is to be deemed the time. So that, under the revised statutes, where the

¹ Code, § 191.

² 3 R. S. (5th ed.), 665, § 32.

death of the principal occurs within eight days after the expiration of the time allowed to answer the complaint, or to appear in the action, the bail may be exonerated. So, if the principal die within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court for the surrender of the principal, such bail may be exonerated under the Code.¹

4. If the principal is dead, the bail are entitled to a discharge, and they have themselves a right to move for such discharge. The death of the principal may be presumed, and there is no arbitrary or positive rule in respect to the time when the presumption of death may be drawn from the continued absence of a person. Neither seven years, nor any specific period need elapse, to lay the foundation for such presumption, but it may be drawn whenever the facts in the case will warrant it.²

5. It was the practice before the Code, to discharge the bail, when the principal had been imprisoned for a long term of years or for life; but not where the imprisonment was for a short period.³ Where a defendant was sentenced to state prison in another state for thirteen years, it was held that he was taken out of the power of his bail, and an exoneratur should be granted.⁴ Where the defendant was imprisoned on a charge of felony he was brought up on a writ of habeas corpus and surrendered by his bail, and they were thereupon discharged.⁵

6. Bail will be discharged where their principal recovers judgment in his favor in the action; but it must be a final judgment, for, if before an exoneratur is entered, the judgment be reversed or set aside with leave to the

¹ Hayes v. Carrington, 12 Abb., 179; 21 How., 143.

² Merritt v. Thompson, 1 Hilton, 550, and cases.

³ Cathcart v. Cannon, 1 John.'s

Cases, 28; Phoenix Fire Ins. Co., v. Mowatt, 6 Cow., 599; Loflin v. Fowler, 18 John., 335.

⁴ Loflin v. Fowler, *supra*.

⁵ Bignell v. Forrest, 2 John., 482.

plaintiff to proceed in the action, their liability is revived.¹ If the judgment be against the principal, and his bail, instead of surrendering him, upon execution issued against the body, elect to pay the amount while an appeal is pending, such payment will not discharge their liability as bail.² Nor will an exoneratur be granted on the ground that the debt in the suit against the principal has been satisfied. Such matter must be pleaded.³

7. If the principal obtains a legal discharge from his debts under the insolvent debtor's act, his bail will be exonerated on motion; since an actual surrender would be an idle ceremony, as the principal must be immediately liberated.⁴ But if the discharge has been obtained at such stage of the action as to allow the debtor to plead it, he must do so, or his bail will be concluded.⁵ On a motion for an exoneratur, the discharge cannot be questioned on the ground of irregularity or fraud.⁶ Where before the time to surrender has expired, the right to imprison the principal has been abolished by the legislature, the bail are entitled to an exoneratur on the ground that the statute is equivalent to a surrender.⁷

8. The bail may also be exonerated where they surrender their principal within twenty days after the commencement of an action against them; or within such further time as the court may grant.⁸ They may make the surrender within the twenty days whether they are indemnified or not;⁹ but no further time will be granted where bail are indemnified.¹⁰

¹ Von Gerhard v. Lighte, 13 Abb., 101; Appleby v. Robinson, 44 Barb., 316.

² Appleby v. Robinson, *supra*.

³ Mechanics' Bank v. Hazard, 9 John., 392.

⁴ Seaman v. Drake, 1 Caines, 9; Franklin v. Thurber, 1 Cow., 427; White v. Blake, 22 Wend., 612.

⁵ Campbell v. Palmer, 6 Cow., 596; Mechanics' Bank v. Hazard, 9 John., 392; Post v. Riley, 18 John., 54.

⁶ Cunningham v. Brown, 5 Cow., 289; Trumbull v. Healy, 21 Wend., 670.

⁷ White v. Blake, 22 Wend., 612; Dunham v. Macomber, 5 Wend., 118.

⁸ § 191, *supra*.

⁹ Brownlow v. Forbes, 2 John., 101.

¹⁰ Bank of Geneva v. Reynolds, 20 How., 18; 12 Abb., 81.

9. After the twenty days have expired the bail cannot properly surrender their principal, and if they do the sheriff cannot hold him.¹ But the court may in the exercise of its discretion exonerate the bail after the expiration of that period for good cause shown.²

10. Before the Code the practice was well settled, that where the bail, by circumstances over which they had no control were prevented from making the surrender within the prescribed time, the court would enlarge the time to surrender, and this might be done although no application had been made, or order to stay proceedings obtained, within the regular time for making the surrender.³ This practice has not been changed by the Code.⁴ (See forms Nos. 35, 36).

11. The sickness of the bail is a good excuse for not making the surrender within the time limited.⁵ So when the surrender is delayed by the sickness of the principal, and the bail are ignorant of the fact, so as to be unable to obtain a stay or further time they are not prejudiced thereby, but will be granted leave to surrender and enter exoneratur.⁶ So the impossibility of procuring a copy of the bail-piece in time is a good excuse.⁷

12. So, any contrivance or misstatement by the plaintiff whereby the bail have been deceived or thrown off their guard, so as to prevent their surrendering the principal within the time, will be sufficient excuse for enlargement of the time.⁸ So, where the plaintiff on receiving part of his debt from the principal, entered into a stipulation not to proceed against him until after a certain day, and

¹ *Baker v. Curtis*, 10 Abb., 279.

² *Gilbert v. Bulkley*, 1 Duer, 668.

³ *Bank of Geneva v. Reynolds*, 20 How., 18, and cases.

⁴ *Id.*, *Gilbert v. Bulkley*, 1 Duer, 668.

⁵ *Boardman v. Fowler*, 1 Johns.'s Cases, 413.

⁶ *Thomas v. Bulkley*, 5 Cow., 25.

⁷ *Van Rensselaer v. Hopkins*, Col. & Cai., Cases, 481; *Nichols v. Sutfin*, 7 Cow., 422; see *Baker v. Curtis*, 10 Abb., 279.

⁸ *Livingston v. Bartles*, 4 John., 478.

this stipulation induced the principal to leave the state, the bail were held to be exonerated.¹ So, where the plaintiff, after having recovered judgment, but before execution, agreed with the principal without the knowledge of his bail, that he might leave the state, and that all proceedings, on the judgment should be stayed until his return, the bail were held to be discharged whether the agreement was made with or without consideration.²

13. Where the bail seek exoneration on the ground of a surrender, they should obtain from the sheriff a certificate of that fact; and where they seek it on the ground of his death, they should present affidavits of such death, or of the facts upon which the presumption is based; and if on either of the other grounds mentioned in section 191, the application should be based upon a certified copy of the record. A copy of the undertaking must be also produced before the judge.³ Such certificate, affidavit, or certified copy of the record, together with a notice of motion, must be served upon the defendant at least eight days prior to the application, and the application must be to a judge of the court or county judge.⁴ (See forms Nos. 32, 33, 34).

14. The order of exoneration, with the papers used on the motion, should be immediately filed with the clerk of the county in which the action was brought.⁵ (For forms, herein, see appendix Nos. 32 to 36 inclusive).

¹Rathbone v. Warren, 10 John., 587.

²Clark v. Niblo, 6 Wend., 236.

³See § 188.

⁴§ 188, see Barker v. Russell, 11 Barb., 304.

⁵§ 188.

SECTION XVI.

SHERIFF WHEN LIABLE AS BAIL — BAIL WHEN LIABLE TO SHERIFF.

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| <ol style="list-style-type: none"> 1. § 201. Sheriff, when liable as bail. 2. § 202. Proceedings on judgment against sheriff. 3. Action may be either for the escape or as bail. 4. When sheriff may show insolvency of principal. 5. Sheriff's liability same as other bail. 6. Sheriff giving bail. 7. Measure of liability. 8. What is an escape. | <ol style="list-style-type: none"> 9. Sheriff liable to plaintiff for an escape. 10. What cases have been held to be escapes. 11. When sheriff may permit defendant to go at large. 12. Sheriff liable for a rescue. 13-14. Recapture after an escape. 15. Discharge of the prisoner by sheriff. 16. § 203. <i>Bail liable to sheriff.</i> 17. When bail liable to sheriff. 18. Nature of the liability. |
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1. "If after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail. But he may discharge himself from such liability by the giving and justification of bail, as provided in sections 193, 194, 195, and 196, at any time before process against the person of the defendant, to enforce an order or judgment in the action."¹

2. "If a judgment be recovered against the sheriff upon his liability as bail, and an execution thereon be returned unsatisfied, in whole or in part, the same proceedings may be had on the official bond of the sheriff to collect the deficiency, as in other cases of delinquency."²

3. The plaintiff has his election to proceed against the sheriff as bail, or for an escape, and that election is manifested by the complaint. If he proceed against him as bail, he must set forth the proceedings to and including the escape, and allege that the defendant is bail, and he must

¹ Code, § 201.

² Code, § 202.

also demand an appropriate judgment. If the plaintiff elects to proceed for an escape, the complaint should contain the same matters, with the exception of the allegation as to the character of the defendant as bail.¹ The action for an escape is given by the common law, and its existence is recognized by the 94th section of the Code which limits the time for the bringing of such action to one year.

4. If the action be against the sheriff as bail, he will not be allowed to show the insolvency of his principal, in mitigation of damages, but if it be an action for escape, it is competent to give in evidence the circumstances of the principal in order to limit the recovery to what the plaintiff has actually lost.²

5. Whenever the sheriff shall become liable as bail, his liability is the same as that of any other bail; and he is also entitled to the same privilege. He may rearrest and surrender the defendant in the same manner and within the same period; he is entitled to the same extension of time in which to make the surrender under like circumstances, and to a discharge or exoneration for the same causes.³ Where the defendant has been held to bail under the third subdivision of section 179, the sheriff's liability is commensurate with the liability of bail under section 211.⁴ But to render the sheriff liable in such case, there must be a judgment under which the property might be taken and delivered on execution. Therefore, where a judgment, in replevin or claim and delivery, is for damages only, and not for the delivery of the property, the sheriff is not liable for such damages by reason of the failure of the sureties to justify, in an undertaking for the delivery of the

¹ *Smith v. Knapp*, 30 N. Y. R., 581, *Sartos v. Merceques*, 9 How., 188;
at p. 592. *Seaver v. Genner*, 10 Abb., 256.

² *Id.*

³ *Buckman v. Carnley*, 9 How., 180;

⁴ *McKenzie v. Smith*, 27 How., 20.

property, if adjudged, and for the payment of such sum as may for any cause be recovered against the defendant.¹

6. Should the sheriff seek to relieve himself from his liability by giving and justifying other bail, he must do so before process issues against the person of the defendant, or his liability will not be discharged. And the bail must be likewise adapted to the action and conform to the original order of arrest; therefore where the original order was to hold the defendant to bail under section 211, the bail put in must be under that section.²

7. The measure of his liability is the judgment obtained against his principal, with the interest thereon, and where the principal appeals he is, like other bail, liable for the costs of the appeal, if awarded against his principal.³ If the action be against him as bail he will not be allowed to show, either in bar of the action, or in mitigation of damages, that before the recovery of judgment the principal was, and has since remained insolvent.⁴ But if the action is for an escape, it is otherwise, and the plaintiff can only recover his actual damages.⁵

8. An escape is where one who is under lawful arrest, evades such arrest and restraint, either violently or privily, or is suffered to go at large by the officer having him in custody, even for the shortest time, before delivery by due course of law.⁶ It must have been a lawful arrest; therefore, if the process by virtue of which the arrest is made, is void, an evasion of the arrest will not be an escape, and the sheriff will not be liable.⁷ An escape is either negligent or voluntary; it is negligent when made without the knowledge or consent of the officer having custody of the person, whether it be from the

¹ Gallaroti v. Orser, 27 N. Y. R., 324. 30 N. Y. R., 581; Levy v. Nichols, 19 Abb., 282.

² McKenzie v. Smith, 27 How., 20.

⁵ Id.

³ Appleby v. Robinson, 44 Barb., 316.

⁶ Crocker on Sheriffs, 245, and cases cited.

⁴ Metcalf v. Stryker, 10 Abb., 12; 31 N. Y. R., 255; Smith v. Knapp,

⁷ Carpenter v. Willett, 21 How., 225.

officer on the arrest, from the jail, or from the liberties of the jail; it is voluntary when made with the assent of the officer having the defendant in custody.¹

9. If any prisoner committed to any jail, by virtue of any *capias ad respondendum* (order of arrest), or other mesne process, or upon surrender in exoneration of his bail, made either before or after judgment rendered, shall go or be at large without the limits and boundaries of the liberties of such jail, without the assent of the party at whose suit such prisoner shall have been committed, the same shall be deemed an escape of such prisoner, and the sheriff having charge of such jail shall be answerable therefor to such party, in an action of trespass on the case, to the extent of the damages sustained by him.² Such action being for an escape the sheriff may show the insolvency of the prisoners in mitigation of damages.³

10. Should the sheriff, after arresting the defendant, leave him in the custody of one not an officer, it will be an escape, as such person has no authority to detain him.⁴ So, if one is on the jail liberties, and knowingly and voluntarily goes beyond such liberties, even for the purpose of avoiding a snow-bank, it will be an escape, and the sheriff will be liable. So, where a prisoner went beyond the jail liberties, into a building supposed to be within the liberties and stayed an hour, it was held to be an escape.⁵ But the sheriff may suffer the defendant to go at large within the jail liberties, even without the bond usually required, and if he escape from such limits, such escape will be *negligent* only.⁶

11. The sheriff may permit one arrested on mesne

¹ Lockwood v. Mercereau, 6 Abb., 208; Crocker on Sheriffs, 245.

² 3 R. S. (5th ed.), 737; (2 R. S., 437, § 62).

³ Smith v. Knapp, 30 N. Y. R., 581; Metcalf v. Stryker, 31 Barb., 62, 10 Abb., 12.

⁴ Palmer v. Hatch, 9 John., 329.

⁵ Tallmadge v. Richmond, 9 John.,

89.
⁶ 3 R. S. (5th ed.), 734; Lockwood v. Mercereau, 6 Abb., 208.

process to go at large, provided he has him in custody at the return day of the writ; but he cannot suffer him to go at large after such return day, or he will be liable for an escape.¹

12. The sheriff, in executing an order of arrest, has full authority to call to his aid the power of the county, and it is his duty to do so where a rescue is apprehended or attempted. He is therefore liable in all cases of rescue.²

13. After a negligent escape, or rescue, the sheriff may on fresh pursuit, recapture the defendant at any time or in any place. He may pursue and take him in any other county,³ or in another state if the government does not object.⁴ He may break open, after demand and refusal, any outer door;⁵ and may retake him even on the Sabbath day.⁶

14. The sheriff may recapture the defendant after a voluntary escape, on an order of arrest, or mesne process, at any time before the return day of the order; but not afterwards. And if, after a voluntary escape, the sheriff is obliged to pay the plaintiff the amount of the judgment, neither the sheriff nor his officers can maintain an action against the defendant for the money thus paid.⁷ But it is otherwise where the escape was negligent. In such case the sheriff can retake the defendant and detain him until he is satisfied by him for the escape, if the plaintiff recover of the sheriff for a negligent escape.⁸

15. The sheriff must discharge the defendant from custody on receiving orders from the plaintiff or his attorney to that effect, and if a plaintiff direct a discharge, the de-

¹ Crocker on Sheriffs, § 589, and cases.

² Code, § 201, supra; 1 R. S. (5th ed.), 750.

³ Rigeway's case, 3 Code R., 52.

⁴ Lockwood v. Mercereau, 6 Abb., 210; Nichols v. Ingersoll, 7 John., 145.

⁵ Allen v. Martin, 10 Wend., 300; Glover v. Whittenhall, 6 Hill., 597.

⁶ Anon., 6 Modern, 231; Parker v. Moore, id., 95; Jones v. Pope, 1 Saund., 35.

⁷ Graham's Pr., 149; Pitcher v. Bailey, 8 East., 171.

⁸ Watson, 150.

fendant cannot be held on a counter order from the attorney.¹ But should the sheriff discharge the defendant on his own responsibility, he will himself be liable as bail, and if he receive a reward for such discharge it will be a misdemeanor, and might also, perhaps, be treated as a contempt of court. If he should take any bond or security to indemnify him for such discharge, it will be absolutely void.²

16. "The bail taken upon the arrest, shall, unless they justify, or other bail be given or justified, be liable to the sheriff by action, for damages which he may sustain by reason of such omission."³

17. Since the bail who have failed to justify are liable to the sheriff for the damages merely which he may sustain by reason of such failure, it follows that he must have sustained such damage before he will have a cause of action. He cannot bring the action against the bail until he shall himself have been proceeded against and damnified as bail.⁴

18. The liability of the bail to the sheriff under the foregoing section arises, not on contract, nor on the undertaking, but for damages sustained by reason of their omission or neglect; and the complaint should contain, not only the facts preliminary to giving the undertaking, the neglect to justify, or to substitute other bail, and the recovery of judgment in the original action, with the execution, but also that the sheriff has received damage by reason of such neglect, and a statement of what that damage was.⁵

¹ Gorham v. Gale, 7 Cow., 739;
Taylor v. Brauceler, 1 Esp. Rep., 45.

² 3 R. S. (5th ed.), 736 and 476;
Webber v. Blunt, 19 Wend., 190.

³ Code, § 203.

⁴ Clapp v. Schutt, 44 Barb., 9; 29
How., 255, 19 Abb., 121.

⁵ Clapp v. Schutt, 44 Barb., 9; 29
How., 255, 19 Abb., 121.

SECTION XVII.

VACATING ORDER OF ARREST, OR REDUCING BAIL.

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| <ol style="list-style-type: none"> 1. § 204. Vacating order of arrest, or reducing bail. 2. § 205. Affidavits on motion. 3. When motion may be made. 4. Defendant has twenty days before judgment to move. 5. When not limited to twenty days. 6. Cannot move after judgment. 7. Where, and to what judge, motion to be made. 8. Motion on plaintiff's papers. 9. When the order will be set aside. 10. When it will not be set aside. 11. Effect of not having an irregular order set aside. 12. Motion on opposing affidavits, where made. 13. Two kinds of motion to vacate on affidavits. 14. Where the cause of arrest and of action are the same. | <ol style="list-style-type: none"> 15. In actions to recover personal property. 16. Where the grounds of arrest are extrinsic to the cause of action. 17. Effect of a denial of plaintiff's allegations. 18. On what grounds, the order will not be vacated. 19. When the arrest was effected by fraud—second arrest. 20. When plaintiff may introduce additional affidavits and what to contain. 21. When judge may order reference on motion to vacate. 22. Conditions on vacating order. 23. Rearresting defendant after discharge. 24. Motion to reduce bail. 25. Renewing motion to vacate order. 26. Appeal from decision of motion. 27. Within what time judge to decide motion to vacate. |
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1. "A defendant arrested may, at any time before judgment, apply, on motion, to vacate the order of arrest, or to reduce the amount of bail." [This section was amended in 1858 by substituting the word "judgment" for the words "the justification of bail."]

2. "If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made."²

3. Prior to the amendment of section 204 made in 1858, the motion to vacate the order of arrest, or to reduce the bail could only be made before the justification of the bail;

¹ Code, § 204.

² Code, § 205.

but since that amendment such motion may be made at any time before judgment, without regard to the fact as to whether bail has been justified or not.¹ (See forms No. 28).

4. By the amendment of section 183 made in 1862, it was provided, that the order of arrest shall be of no avail, and shall be vacated or set aside on motion, unless the same is served upon the defendant, as provided by law, before the docketing of any judgment in the action; and the defendant shall have twenty days after the service of the order of arrest, in which to answer the complaint in the action, and to move to vacate the order of arrest, or to reduce the amount of bail.²

5. Before such amendment the plaintiff could serve the order of arrest before, but so near the entry of judgment, as to preclude the defendant from moving to set it aside.³ The amendment was made to prevent such practice, and to give the defendant a reasonable time, under all circumstances, to move to vacate the order, or to reduce the bail. It does not shorten the time allowed by section 204, but extends it in those cases where the arrest is made within twenty days of the day on which judgment could be entered; so that the defendant may move to vacate the order, or to reduce the bail, at any time after the arrest and before judgment; but he shall, in all cases have twenty days after the arrest to make such motion. The various cases as to within what time the motion was to be made before the above amendment of section 205, have been superseded by such amendment and need not be given.⁴

¹ Wicker v. Harmon, 21 How., 462; 12 Abb., 476; Warren v. Wendell, 13 Abb., 187.

² Code, § 183, ante.

³ See Barker v. Wheeler, 23 How., 193.

⁴ For some of those cases see Bar-

ber v. Hubbard, 3 Code R., 169; Dale v. Radcliff, 15 How., 70; Overrill v. Durkee, 2 Abb., 383, reported as O'Niel v. Durke, 12 How., 94; Lewis v. Friesdell, 3 Sandf., 706; Wilmerding v. Moon, 1 Duer, 643; 8 How., 213.

6. As has been before stated, the motion may be made at any time before judgment, whether bail has been given and justified or not; but after judgment in the action the motion cannot be made.¹ But such judgment must be final; therefore, where a judgment is entered for default of an answer, and the defendant is afterwards let in to defend, the judgment standing in the meantime as security, the defendant may be arrested on the original cause of action, and a motion made to vacate the order of arrest.² After a motion to vacate the order has been made and denied, it cannot be renewed without leave of the court.³

7. Where the motion is made on the plaintiff's papers without introducing affidavits on the part of the defendant, it may be made *ex parte*, and at chambers before the judge who granted the order; but if made before any other judge, or if made on affidavits on the part of the defendant, it must be made to the court, on notice, in the same manner that other motions are made.⁴ But a county judge has no power to hear the motion where it is made on notice, as he has only the powers of a supreme court at chambers; he may, however, vacate an order of arrest made by him on an *ex parte* application.⁵

8. Where the defendant makes the motion on the plaintiff's affidavits alone, the sole question is, whether such affidavits authorize the granting of the order.⁶ The plaintiff cannot introduce additional evidence in support of the order, but it must stand or fall on the original papers.⁷ But such papers, being uncontradicted, will be

¹ *Barker v. Wheeler*, 23 How., 193; 14 Abb., 170; *Roberts v. Carter*, 17 How., 479; 9 Abb., 106, note.

² *Union Bank v. Mott*, 16 How., 525; 8 Abb., 150; *Aff'd*, 17 How., 354; 9 Abb., 106.

³ *Lovell v. Martin*, 21 How., 238.

⁴ See Code, § 324; *Cayuga County*

Bank v. Warfield, 13 How., 439; *Rogers v. McElhone*, 20 How., 441.

⁵ *Rogers v. McElhone*, 12 Abb., 292; 20 How., 441.

⁶ *Martin v. Vanderlip*, 3 How., 265.

⁷ See *Peel v. Elliott*, 16 How., 481; *Martin v. Vanderlip*, *supra*.

taken as true, and if they establish a *prima facie* case, the order should stand. They will, however, be strictly construed against the plaintiff.¹ It was held before the amendment of section 204, in 1858, that the putting in and perfecting bail was a waiver of any defects or insufficiency in the plaintiff's affidavits;² but this is probably not the rule now.³ The motion should be made without any unnecessary delay.

9. Where the plaintiff's affidavits fail to make out the offense charged, or to establish a *prima facie* case;⁴ or where they are founded on hearsay without setting forth the sources of information, the order will be set aside.⁵ So, a fatal defect in the complaint;⁶ or a variance, showing clearly that the ground of arrest and the cause of action are inconsistent;⁷ or a joining in the complaint of causes of action to which the remedy of arrest extends, with others to which it does not, are grounds for vacating the order on an *ex parte* application.⁸ So, the order may be set aside, where the undertaking filed on obtaining the order is not indorsed with the approval of the justice.⁹

10. But the order will not be vacated on an objection merely technical, which is independent of the cause of arrest, and which may be remedied by amendment, such as a misjoinder of parties;¹⁰ or an error in entitling the summons;¹¹ or because the summons has been amended, since granting the order.¹² Nor will it be vacated on the ground that the case made by the complaint varies from

¹ Lovell v. Martin, 21 How., 238; Hathorne v. Hall, 4 Abb., 227; Moers v. Morro, 29 Barb., 361.

² Stewart v. Howard, 15 Barb., 26; see Bedell v. Sturta, 1 Bosw., 634; 6 Abb., 319, note.

³ See Til. & Sher. Pr., 597; Columbus Ins. Co. v. Force, 8 How., 353.

⁴ Sachs v. Bertrand, 22 How., 95; 12 Abb., 433.

⁵ Cook v. Roach, 21 How., 152.

⁶ Bell v. Mali, 11 How., 254; Neville v. Neville, 22 How., 500.

⁷ Seymour v. Van Curen, 18 How., 94; Wicker v. Harmon, 21 How., 462; 12 Abb., 476.

⁸ Lambert v. Snow, 9 Abb., 91; 17 How., 517; McGovern v. Payne, 32 Barb., 83.

⁹ Newell v. Doran, 21 How., 427.

¹⁰ Webber v. Moritz, 11 Abb., 113.

¹¹ Bedell v. Sturta, 1 Bosw., 634.

¹² Union Bank v. Mott, 6 Abb., 316.

that made by the affidavits, if the affidavits are themselves sufficient and disclose a ground of arrest, which is consistent with the allegations of the complaint;¹ nor because the defendant has been proceeded against for the same cause in a foreign tribunal;² nor because the action is barred by the statute of limitation, where no such defense is set up in the answer;³ nor because the copy of the affidavit served contains no signature of the affiant, or of the officer before whom it was sworn to, such omission being an irregularity only which may be amended.⁴ Nor is it a ground to vacate the order, that the defendant, at the time of the arrest, was privileged from arrest. The arrest itself may be set aside, but the order should stand, that the arrest may be made when the exemption expires.⁵ But if the action is one in which the defendant is not liable to arrest, and he has given bail, he should move to vacate the order of arrest, and not for an exoneration and discharge of his bail.⁶

11. If the defendant be arrested before judgment on an order of arrest, when he is not liable to arrest; or on an order ever so irregularly obtained, if he does not move to set it aside before judgment, he can be legally arrested on an execution against his person.⁷

12. Where the motion to vacate is made on opposing affidavits on the part of the defendant, it must be on a notice of eight days, and to the court, at term. Neither the judge at chambers, nor the county judge has power to hear such motion.⁸ The notice to the plaintiff must be accompanied by copies of the defendant's affidavits; and

¹ *Stelle v. Palmer*, 7 Abb., 181.

² *Arthur v. Dalley*, 20 How., 311.

³ *Id.*

⁴ *Barker v. Cook*, 40 Barb., 254; 25 How., 190.

⁵ *Hart v. Kennedy*, 15 Abb., 290.

⁶ *Holbrook v. Homer*, 6 How., 86.

⁷ *Smith v. Knapp*, 30 N. Y. R., 581.

⁸ *Rogers v. McElhone*, 20 How., 441; 12 Abb., 292; *Lancaster v. Boorman*, 20 How., 421; *Cayuga Bank v. Warfield*, 13 How., 439.

the plaintiff may oppose the motion by affidavits, or other proof in addition to those on which the order was granted.¹

13. Motions to vacate on opposing affidavits may be divided into two classes: 1. Where the cause of action and of arrest are the same, and the grounds of arrest form an integral part of the cause of action, and of the issue to be tried; and 2. Where the grounds of arrest are extrinsic to, and independent of, the cause of action; as where the ground of arrest is fraud in contracting the debt for which the action is brought; or where the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

14. In the first of these cases, or where the right to arrest is derived from the nature of the action, the burden of proof, on a motion to vacate, is on the defendant.² The order will not be set aside on the merits, unless the defendant clearly makes out such a case as would call on the judge at the trial, either to nonsuit the plaintiff, or to direct a verdict for the defendant; and the defense must be clearly proved, for the court has no right to say upon doubtful evidence, that the plaintiff cannot recover in the action.³ If there is any ambiguity as to the nature of the cause of action, the court will determine, not what cause of action the plaintiff has intended to set forth, but rather what cause of action he must rely upon for recovery.⁴

15. The right to arrest the defendant, in an action to recover the possession of specific personal property, does not depend upon the character of the action, but on the question as to whether or not the defendant has disposed

¹ See § 205, *supra*.

² *Republic of Mexico v. De Arango*, 5 Duer, 634, 641; 11 How., 576; *Falconer v. Elias*, 3 Sandf., 731.

³ *Barrett v. Gracie*, 34 Barb., 20;

Levins v. Noble, 15 Abb., 475; *Causland v. Davis*, 4 Bosw., 619; *Frost v. McCarger*, 14 How., 142, and cases cited above.

⁴ *Peel v. Elliott*, 7 Abb., 433; 28

Barb., 200; 16 How., 485.

of, or concealed his property, with a fraudulent intent. Hence, the ground of arrest is not inherent, in the cause of action, and the court may try the fact of removal, and the question of intent upon the affidavits.¹ But in an action to recover the value of goods converted by the defendant, the defendant cannot entitle himself to a vacation of the order of arrest, by showing that he has a claim against the plaintiff for a larger amount.²

16. When the grounds of arrest are extrinsic to, and independent of, the cause of action, the burden of proof, on a motion to vacate rests, upon the plaintiff, and if he does not make out his case, the defendant will be discharged. The test is whether, upon the whole case, as made by the affidavits on both sides, the court, if called upon to act on the application as *res nova*, would grant the order. The court will determine the question precisely as it ought to be determined if submitted to a jury.³

17. Where the defendant absolutely and unqualifiedly denies the facts alleged in the plaintiff's affidavit on which the arrest was granted, the order will be vacated, unless the plaintiff produce additional proofs. The balance of proof must be in favor of the plaintiff.⁴

18. The order will not be vacated on the ground that the allegations of the complaint vary from those of the affidavit, if the affidavit is itself sufficient, and discloses a ground of arrest, which is consistent with the complaint.⁵ Nor because the summons has been amended since the granting of the order; ⁶ nor because an attachment suit is

¹ Jananiqué v. DeLuo, 1 Abb. (N. S.) 419; Manly v. Paterson, 3 Code R., 89.

² Huelet v. Reyno, 1 Abb. (N. S.), 27.

³ Chapin v. Seeley, 13 How., 493; Barron v. Sanford, 14 How., 443; 6 Abb., 320, note; Allen v. McCrassen, 32 Barb., 662; Frost v. McCarger, 14 How., 142.

⁴ Allen v. McCrassen, 32 Barb., 662; Brodsky v. Ihms, 25 How., 471; 16 Abb., 251; Mecklin v. Berry, 23 How., 380; see an *obiter dictum* to the contrary in Philips v. Benedict, 20 How., 265; see also anon., 6 Abb., 319, note.

⁵ Bedell v. Sturta, 1 Bosw., 634.

⁶ Union Bank v. Mott, 6 Abb., 316.

pending between the same parties and for the same cause of action, in another state;¹ nor because there is an improper joinder of parties plaintiff;² nor because the debt is barred by the statute of limitation, unless such defense is set up in the answer;³ nor for *laches* in serving the complaint, if excuse for such *laches* is shown.⁴

19. But the defendant will be discharged from arrest where it appears that the arrest was affected by enticing him within the bailwick of the sheriff having the order, by means of false representations.⁵ So, when the defendant has been already arrested for the same cause, under the valid process of another court, he will be discharged, or the plaintiff put to his election.⁶ But it is otherwise where such prior process was not legal.⁷ Where a defendant has been arrested at a time when he was privileged from arrest, he should move for a discharge from arrest, and not to vacate the order.⁸

20. When the motion of the defendant to vacate the order is made on affidavits, the plaintiff can oppose such motion by affidavits supplemental and additional to those used in obtaining the order. But such affidavits cannot be introduced to supply defects in the original affidavits;⁹ nor can they set forth a ground for retaining the order, not set forth as the original ground of the order;¹⁰ except that evidence of other similar and concurrent frauds, committed by the defendant, is admissible, as proof of the intent in committing the particular fraud charged.¹¹ The plaintiff's affidavits should be drawn for the express pur-

¹ *Litheau v. Turner*, 1 Code R. (N. S.), 210.

² *Webber v. Moritz*, 11 Abb., 118.

³ *Arthurton v. Dalley*, 20 How., 311.

⁴ *Ferris v. Seeley*, 23 How., 422.

⁵ *Goupil v. Simonson*, 3 Abb., 474.

⁶ *Hernandes v. Carnobeli*, 4 Duer, 642; 10 How., 433.

⁷ *Schadle v. Chase*, 16 How., 413.

⁸ *Hart v. Kennedy*, 15 Abb., 290. 24 How., 425.

⁹ *Martin v. Vanderlip*, 3 How., 265.

¹⁰ *Cady v. Edmonds*, 12 How., 197.

¹¹ *Ballard v. Fuller*, 32 Barb., 684; *Scott v. Williams*, 14 Abb., 70; 23 How., 398; see also *Hall v. Naylor*, 8 N. Y. R., 588; *Hathorne v. Hodges*, 28 N. Y. R., 486.

pose of meeting and repelling the case made in the defendant's affidavits.¹ Where the original affidavits are defective in form, leave will sometimes be given to amend them.² A sworn complaint may be used as an affidavit; and if the complaint and affidavits are together sufficient to warrant the order, it will be sustained.³

21. When the cause of arrest is not identical with the cause of action, and the affidavits are conflicting, the judge or court may order a reference to take testimony, and adjourn the proceedings on the motion till the coming in of the referee's report.⁴ The reference will be to take the evidence; and it will be the duty of the referee to take all that is offered, and leave it to the court on hearing of the motion to determine what is, and what is not, competent.⁵ He should, however, reject statements made on information and belief, unless it be shown whether the information was in writing or not, and, if in writing, unless the writing be produced, and if not in writing, then, unless the source of the information be particularly set forth.⁶ A reference should only be ordered in those cases where the affidavits and other proofs are conflicting, and the judge unable to come to a definite conclusion on the facts before him.⁷

22. The court will, in some cases, especially where it appears that the arrest was without malice and for probable cause, require, as a condition of vacating an order of arrest, that the defendant stipulate not to bring any action for false imprisonment, or for damages by reason of the arrest;⁸ but it seems that this condition can only be re-

¹ Cases cited above.

² *Bell v. Mali*, 4 How., 254; *Webber v. Moritz*, 11 Abb., 113.

³ *Brady v. Bissell*, 1 Abb., 76; *Turner v. Thompson*, 2 Abb., 444.

⁴ *Barren v. Sandford*, 14 How., 443; 6 Abb., 320, note.

⁵ *Scott v. Williams*, 23 How., 393.

⁶ *Sturm v. Van Camp*, cited in *Hoff. Pro. Rem.*, 100.

⁷ *Stelle v. Palmer*, 7 Abb., 181.

⁸ *Northern R.R. Co. v. Carpentier*, 4 Abb., 47; *Alden v. Sarcon*, 4 Abb., 102; *Merchants' Bank v. Dwight*, 13 How., 371; *Rigney v. Tallmadge*, 17 How., 558; *McGovern v. Payne*, 32 Barb., 83.

quired where the court has a discretion in granting the order of vacation.¹ Where on an appeal from an order denying defendant's motion to vacate an order of arrest, the order was to be reversed on defendant's stipulating not to sue for the arrest, or in default of such stipulation the order was to be affirmed; the defendant declined so to stipulate; the court held that the order was conclusive on the defendant, on his motion to set aside an execution against his person, and that they would not review the order on the ground that the condition was oppressive.² (See forms No. 30).

23. Where the order of arrest has been vacated and the defendant discharged from arrest, the matter is *res judicata*, and he cannot be rearrested, even though adjudged guilty of fraud at a trial had upon his default to appear upon the call of the cause.³ It is probable that this rule applies only to those cases where the grounds of arrest are extrinsic to, and independent of, the cause of action. If the defendant be released from arrest by consent of the plaintiff or his attorney, he may nevertheless be arrested on execution.⁴

24. The motion to reduce the bail is addressed to the discretion of the court, and it may be made on the plaintiff's own showing, where the amount required is clearly excessive.⁵ But, ordinarily, the amount of bail fixed by one judge should not be reduced by another, unless new facts are presented bearing upon the question, and justifying an interference.⁶ A motion to vacate an order of arrest does not embrace a motion to reduce the bail, although it includes an application for further or other

¹ Decker v. Judson, 16 N. Y. R., 446.

² Edgerton v. Ford, 11 Abb., 415.

³ Steele v. Palmer, 11 Abb., 62; Enoch v. Ernst, 21 How., 96.

⁴ Meech v. Loomis, 28 How., 209.

⁵ Baker v. Swackhamer, 5 How., 251.

⁶ Union Bank v. Mott, 6 Abb., 815.

relief. The questions involved in the two motions are entirely distinct, and depend on different facts.¹

25. Where a motion to vacate the order of arrest to reduce the bail, has been made and denied, it cannot be renewed on any state of facts without leave of the court.² And after the defendant has moved on the plaintiff's affidavits, he should not have leave to renew it on affidavits contradicting those of the plaintiff; for by moving on the plaintiff's affidavits, he admits those affidavits to be true.³

26. An appeal from a decision upon a motion to vacate the order, or to reduce the bail, will lie to the general term, but not to the court of appeals;⁴ and such appeal will not be prejudiced by the entry of judgment against the defendant pending the appeal.⁵ Such appeal lies from an *ex parte* order of a county judge vacating an order of arrest granted by him.⁶ But after defendant has given bail and is at large, an appeal from an order denying a motion to vacate the order of arrest will not be encouraged.⁷ So, an order reducing the amount of bail will not, under ordinary circumstances, be reviewed on appeal.⁸ The court at general term cannot, on appeal from a judgment, consider whether an order of arrest in the action, was properly granted.⁹ Where a motion to vacate the order of arrest, has been denied, with leave to renew the motion on additional affidavits, if the defendant avails himself of that leave, he will be precluded from appealing from the order denying his first motion.¹⁰

¹ Smith v. Spaulding, 30 How., 339.

² Lovell v. Martin, 21 How., 238; 12 Abb., 178; Union Bank v. Mott, 6 Abb., 315.

³ Lovell v. Martin, *supra*; Hathorn v. Hall, 4 Abb., 227.

⁴ Code, § 349; Col. Ins. Co. v. Force, 8 How., 353; Genin v. Tompkins, 1 Code R. (N. S.), 415.

⁵ Pacific Mut'l Ins. Co. v. Machado, 16 Abb., 451.

⁶ Lancaster v. Boorman, 20 How., 420.

⁷ Moers v. Morro, 17 How., 280; 29 Barb., 361; 8 Abb., 257.

⁸ Hart v. Kennedy, 15 Abb., 290.

⁹ Ross v. West, 3 Bosw., 360.

¹⁰ Noble v. Prescott, 4 E. D. Smith, 139.

27. It is the duty of the judge to render and make known his decision upon a motion to vacate, modify or set aside an order of arrest, within twenty days after the motion is submitted to him for his decision.¹ (For forms herein, see appendix Nos. 28, 29, 30).

¹ Code, § 401, sub 8.

SECTION XVIII.

ARREST ON EXECUTION.

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| <ol style="list-style-type: none"> 1. § 288. Execution against the person. 2. Where the complaint unnecessarily contains allegations of fraud. 3. When the arrest in execution depends on a prior order of arrest. 4. Arrest on execution after a discharge from an order of arrest. 5. In actions to recover property, real or personal. 6. When execution against body may issue. 7. When without order of the court. | <ol style="list-style-type: none"> 8. When defendant may move to set aside execution. 9. Arrest of plaintiff for costs. 10. The effect of taking the body in execution. 11. Defendant entitled to jail liberties. 12-13. Snrpsedeas. 14. Bail must be exonerated before motion for. 15. Computing time for charging in execution. 16. When creditor may notify sheriff to discharge defendant. |
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1. "If the action be one in which the defendant might have been arrested, as provided in section 179 and section 181, an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court after the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor unless an order of arrest has been served, as in this act provided, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 179."¹ The last sentence of this section was added in 1862.

2. The amendment of 1862 was but confirmatory of a long line of decisions made prior thereto. But there is one case which may not be covered by the amendment; that is, where the complaint unnecessarily contains allegations which would justify an order of arrest, but which have no

¹ Code, § 288.

real connection with the cause of action, and the defendant allows judgment to be taken by default, is there such an admission of the fraud as would justify an execution against the body, there having been no order of arrest. It was thought prior to the amendment of the above section, that there was not.¹

3. When the action is for either of the causes of action enumerated in the first two subdivisions of section 179, the facts authorizing the arrest will generally be stated in the complaint, and when a judgment is rendered in favor of the plaintiff, the right to imprison the defendant on an execution is conclusively established. But when the action is for any other cause of action, except that mentioned in the last clause of subdivision four, section 179, the facts cannot properly be stated in the complaint, and reference must be had to the affidavits, made to procure the order of arrest, in order to ascertain whether the case is one in which the defendant may be arrested on a *ca. sa.*²

4. After a defendant has been arrested on an order of arrest which is afterwards vacated, he is not liable to arrest on execution because the jury have found him guilty of fraud in contracting the debt. The question of fraud in contracting a debt or incurring an obligation for which the action is brought, is not a part of the *res gesta*, and the decision vacating the order of arrest is conclusive.³ But after a defendant has been arrested, pending the suit, a mere release from imprisonment by the consent of the plaintiff, on giving security, will not exempt him from an execution against his person. If the order of arrest has been vacated, it seems the defendant cannot again be arrested on final process.⁴

5. An execution against the person cannot issue on a

¹ *Humphrey v. Brown*, 17 How., 481.

² *Stelle v. Palmer*, 11 Abb., 62.

³ *Smith v. Knapp*, 30 N. Y. R., 581, per Mullin, J.

⁴ *Meech v. Loomis*, 23 How., 484; 14 Abb., 428.

judgment in an action to recover possession of specific personal property, unless an order of arrest has been issued and served before judgment.¹ In an action to recover the possession of real property and damages for the detention, an execution against the person can issue on the judgment;² but not if the action was to recover possession of lands simply, without damages for detention.³

6. The execution against the person may be issued at any time after the actual return of that against the property. It is not necessary that sixty days should intervene between the issuing of the two executions.⁴ Nor is it necessary that the execution against the property should be issued to the sheriff of the county where the plaintiff resides.⁵ If the execution against the body be issued before the return of that against the property, it will be an irregularity only, and will not invalidate the execution against the person.⁶ So if the sheriff neglect to indorse his return on the execution against the property, before filing it, and an execution against the body be issued, the latter will be upheld by indorsing the return upon the former *nunc pro tunc*.⁷

7. When the defendant has been arrested on a provisional remedy, an execution against his person may be issued by the plaintiff after judgment without an order of the court.⁸ But if the execution against the person is not authorized, it will be void, and the parties issuing it will be liable for false imprisonment.⁹

¹ Purchase v. Bellows, 14 Abb., 357; 23 How., 421; Aff'd, see 16 Abb., 105.

² Merritt v. Carpenter, 30 Barb., 61.

³ See Fullerton v. Fitzgerald, 18 Barb., 441; 10 How., 37; Brush v. Mullen, 12 Abb., 242.

⁴ Fake v. Edgerton, 3 Abb., 229; 5 Duer, 681.

⁵ Id.

⁶ Renick v. Orser, 4 Bosw., 384.

⁷ Hall v. Ayer, 9 Abb., 220; 19 How., 91.

⁸ Bull v. Maliss, 13 Abb., 241.

⁹ Sleight v. Leavenworth, 5 Duer, 122.

8. Where the party was not liable to arrest on an order of arrest, or where a case was not made which justified the issuing of that process, or the proceedings to obtain the order were irregular, or where judgment is recovered for a cause of action for which the defendant is not liable to arrest, he may move to set aside the execution against the person.¹ So, it has been held that a defendant might move after judgment to be discharged from arrest on such execution, on the ground that the affidavit on which the order of arrest was granted was fatally defective.² And such motion may be made although the defendant has, before the judgment, moved to vacate the order of arrest and his motion has been denied.³

9. The plaintiff who fails in an action of tort, in which the defendant was liable to arrest, may be arrested by an execution against his person, for the costs of such action, although the defendant was not in fact arrested, and no order had been made for his arrest.⁴ But as a female cannot be arrested before judgment in any action, except for a willful injury to person, character or property, so she cannot be taken in execution, except in the like cases; and as a married woman is not liable to arrest in any civil action, she cannot be taken for costs where she fails in an action for the conversion of property.⁵

10. The effect of taking the body of a party in execution is, as a general rule, a satisfaction of the judgment for the time being;⁶ but if the party die in execution, or is rescued or improperly discharged, a new execution may issue.⁷

¹ *Smith v. Knapp*, 30 N. Y. R., 581; *People v. Willett*, 26 Barb., 78; 10 How., 210.

² *Pope v. Newcomb*, cited in *Smith v. Knapp*, 30 N. Y. R., 581.

³ *Id.*, *Smith v. Knapp*, 30 N. Y. R., 581.

⁴ *Corwin v. Freeland*, 6 How., 245; *Merritt v. Carpenter*, 30 Barb., 61;

see *Keoppenburg v. Neefus*, 4 Sandf., 655.

⁵ *Hovey v. Starr*, 42 Barb., 435.

⁶ *Fassell v. Tallmadge*, 15 Abb., 205; *Bank of Beloit v. Beale*, 7 Bosw., 611.

⁷ *Wessen v. Chamberlain*, 3 Coms., 331.

11. A defendant seized on execution against the body is entitled, on executing the required bond, to be admitted to the liberties of the jail.¹ (See forms Nos. 37, 38, 39).

12. The provisions of the revised statutes in relation to a *supersedeas* are as follows: "When any defendant, at the time judgment shall be rendered against him in any court of record, shall be in the custody of the sheriff or other officer, either upon process in the suit in which such judgment shall have been rendered, or upon being surrendered in discharge of his bail in such suit, the plaintiff in such judgment shall charge such defendant in execution thereon, within three months after the last day of the term next following that at which such judgment shall have been obtained. And where any defendant shall be in custody upon a surrender in discharge of his bail, made after a judgment obtained against him and such bail shall be thereupon exonerated, the plaintiff in such judgment shall charge such defendant in execution thereon, within three months after such surrender, or if an execution against the property of such defendant shall have been issued, within three months after the return day of such execution."² "If any plaintiff shall neglect so to charge any defendant in execution as required in the last section, such defendant may be discharged from custody by a *supersedeas* to be allowed by any judge of the court in which such judgment shall have been obtained, unless good cause to the contrary be shown; and after being so discharged, such defendant shall not be liable to be arrested upon any execution which shall be issued upon such judgment."³

13. It was remarked by Justice Mullin, in *Smith v. Knapp* that there may be some doubt as to whether these provisions are now in force, in view of section 283 of the Code, which gives to the party in whose favor judgment

¹ See further on this subject, ante; sec. x, pl. 43, et seq.

² 3 R. S. (5th ed.), 870, § 38.

³ 3 R. S. (5th ed.), 871, § 39.

is entered, four years from the entry of such judgment within which to issue executions, as provided in the 9th title, of which said section 283 is a part.¹

14. A motion for a supersedeas cannot be granted on the ground that plaintiff has neglected, for three months, to charge the defendant in execution, unless the bail have been exonerated, and the moving papers should show that fact.²

15. The time for charging in execution is to be computed from the date of the actual entry of judgment, and not from the date when the plaintiff might have entered it. The mere acceptance of an offer to allow judgment, is not obtaining judgment within the meaning of the statute.³ So where the defendant has been surrendered by his bail, the time within which the plaintiff must charge him in execution, will run, not from the actual surrender, but from the exoneration of the bail.⁴

16. When any person shall have remained charged in execution for the space of thirty days from the date of his imprisonment, any creditor at whose suit he shall have remained charged, may, by a written notice, require the sheriff of the county in which such person shall be imprisoned to discharge him from imprisonment, and, therefore, such prisoner shall be discharged from imprisonment so far as he is held under such execution, and thereafter such creditor may have the same civil remedies to enforce payment of the judgment upon which such execution was issued as if such execution had not been issued, and such person so discharged had not been charged in execution at the suit of such creditor. But no further execution against the body of such person shall be issued on such judgment.⁵

¹ See 30 N. Y. R., at page 590.

² Hills v. Lewis, 13 Abb., 101, note.

³ Lippman v. Petersberger, 18 How., 270; 9 Abb., 209.

⁴ Hills v. Lewis, 13 Abb., 101, note.

⁵ 3 R. S. (5th ed.), 108, last part of § 17.

CHAPTER II.

CLAIM AND DELIVERY.

SECTION I. Nature of the remedy, and when allowed.

II. The affidavit.

III. Security by plaintiff — Requisition, and how executed.

IV. Exception to, and justification of, plaintiff's sureties.

V. Redelivery to defendant.

VI. Claim by third person; filing papers; setting aside proceedings; arrest of defendant, etc.

SECTION I.

NATURE OF THE REMEDY, AND WHEN ALLOWED.

- | | |
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| 1. § 206 of the Code. Delivery of personal property. | 17. For property taken for tax, fine, etc. |
| 2. Nature of the action. | 18. Property taken on execution. |
| 3. Object of the action. | 19. Property taken by replevin. |
| 4. Time for obtaining the remedy. | 20. Does not lie between partners, etc. |
| 5. Title of plaintiff. | 21. Where title is in third person. |
| 6. Plea of property in a stranger. | 22. For what property. |
| 7. Who may have — executors, etc. | 23-31. What articles are personal property. |
| 8. When the action lies. | 32. Where property is confused. |
| 9. For a wrongful taking. | 33. Voluntary confusion. |
| 10. Against an officer. | 34. What damages may be recovered. |
| 11. Against a fraudulent purchaser. | 35. Form of verdict. |
| 12. By a mortgagee. | 36. Form of judgment. |
| 13. By one having a lien. | 37. Costs in the action. |
| 14. For goods sold conditionally. | 38. Form of execution. |
| 15. For a wrongful detention. | 39. Abatement of the action. |
| 16. When the action does not lie. | 40. Discontinuance. |

1. "The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the imme-

ciate delivery of such property, as provided in this chapter.”¹ This section remains unchanged since 1849.

2. The provisions of this chapter are a substitute for the action of replevin, as given by the revised statutes; and such an action may now be brought in all cases where replevin would formerly lie, and is as full, general and complete as that action was under the revised statutes.² The old action of *detinue* was abolished in this state by the revised statutes, and that of replevin extended, so as to serve all the purposes of both actions. The actions of replevin were of two kinds, one in the *cepit* and the other in the *detinet*. The wrong upon which replevin in the *cepit* was founded, was the wrongful taking from the owner the possession of his property. While replevin in the *detinet* was founded upon a wrongful detention of property, and was a substitute for the old action of *detinue*, and a remedy concurrent with *trover*.³ Under the revised statutes, the action of replevin would lie whenever any goods or chattels had been wrongfully distrained, or otherwise wrongfully taken, or detained, for the recovery thereof, and for the recovery of damages sustained by reason of such unjust caption or detention; with the exception that no such action should be for any property taken by virtue of any warrant for the collection of any tax, assessment or fine, in pursuance of any statute of this state; nor for goods or chattels seized by virtue of any execution or attachment, unless such goods and chattels are exempt by law from such execution or attachment.⁴ The provisions of this chapter being a substitute for replevin, the old practice is to be resorted to, in contingencies not provided for by the Code.⁵

¹ Code, § 206.

² *Ross v. Cassidy*, 27 How., 416;
Brockway v. Burnap, 16 Barb., 309;
Nichols v. Michael, 23 N. Y. R., 264.

³ *Barrett v. Warren*, 3 Hill, 348;
Ross v. Cassidy, 27 How., 416.

⁴ 3 R. S. (5th ed.), 845.

⁵ *Brockway v. Burnap*, 16 Barb., 309; *Roberts v. Randall*, 5 How., 327.

3. The object of this action is the recovery of specific personal property ; with such damages as have been sustained, by reason of the wrongful taking or detention ; but such damages are merely incidental to the action. If, before action brought, the defendant offers unconditionally to restore the property, the object is already attained and the proceeding under this chapter is unnecessary. Such an offer is equivalent to a tender before suit brought.¹ But after the action has been commenced, a voluntary taking of the property, not from the defendant himself, but by the plaintiff's picking it up where he chanced to find it, does not extinguish his right of action.² The judgment prayed for in the complaint determines principally the character of the action ; and, therefore, if the judgment sought is damages for the taking, detention, or conversion, and not for the specific property, this remedy is wholly unwarranted.³ Nor can the plaintiff elect, as under the revised statutes, to take judgment for the value of the property, but he is entitled only to a judgment in the alternative, for the return of the property, or for the value thereof, in case a delivery cannot be had, together with damages for the detention thereof.⁴

4. The plaintiff may obtain this remedy at the time of issuing the summons, or at any time before answer ; or he may wait the final determination of the action and then ask for the return. If the plaintiff is willing to give the security, he may have the return before answer, but if he be either not willing, or not able to do so, it deprives him of no benefit, and gives the other party no special advantage ; he may still, in the ultimate judgment, ask for a return. These provisions were intended to give a

¹ *Savage v. Perkins*, 11 How., 17.

² *Tracy v. N. Y. & Har. R. R. Co.*, 9 Bosw., 396.

³ *Savage v. Perkins*, 11 How., 17 ;
Seymour v. Van Buren, 18 How., 94.

⁴ Code, § 277, *Dwight v. Enos*, 5 Seld., 470 ; *Fitzhugh v. Wiman*, id., 559.

privilege or election to the plaintiff; since there doubtless would arise cases where the property was of such a peculiar character, that neither its value, nor any damages that might be awarded for its detention would afford the true owner any adequate compensation for its loss or permanent deprivation; while in others such an amount would afford a full indemnity; or he might be willing to wait, and run his chance of restitution upon the final judgment.¹ The usual practice, however, is to deliver the summons and the requisition to the sheriff at the same time; as the remedy may be defeated, by delaying until after the complaint is served, for the defendant may answer at once.

5. In order to obtain this remedy the plaintiff must show an absolute title to the goods, of which he seeks to obtain possession, with a right of immediate possession; or such a special property therein as to entitle him to an immediate and lawful possession of them.² Right to the possession and dominion of the goods and chattels for the time is essential.³ If the action is brought for an unlawful *taking*, the plaintiff must establish, either that he was in actual possession, or that he was entitled to the immediate possession of the property at the time it was taken.⁴ But where there is an actual possession of the property by the plaintiff, coupled with an equitable interest therein at the time of the seizure by the sheriff, and such seizure is made upon an execution against the former owner, the plaintiff may maintain the action, although the general property and the right of immediate possession are at the same time in a stranger, provided the defendant does not show any privity between himself and such stranger. A purchaser of property, to whom the title is actually transferred may

¹ Corbin v. Milton, 27 How., 76, 105; Dodworth v. Jones, 4 Duer, per Bacon, J.; Vogel v. Babcock, 201.

² 1 Abb., 176.

³ McCurdy v. Brown, 1 Duer, 101,

⁴ Rogers v. Arnold, 12 Wend., 30.

⁵ Redman v. Hendrick, 1 Sandf., 32.

maintain this action, although he has not paid for the goods.¹

6. The plaintiff must be entitled to the immediate possession of the property, so that where an agent or factor has a right of possession, having a lien, the action cannot be maintained by the owner.² But the lien, to be a defense to an action of replevin must be a legal and sufficient lien, for otherwise the defense will be unavailing.³ It is well settled, as a general rule, that, in an action to recover the possession of personal property, the plea of property in a third person is good, and entitles the defendant to have a return thereof without connecting himself with the right of such person, or in any manner connecting himself with such title.⁴ But where the plaintiff has an interest in the property which would have sustained trespass or replevin it will constitute a good reply to the plea of property in a stranger. The property, then, whether in the defendant or in a stranger, sufficient to sustain a defense, must be such as goes to destroy the interest of the plaintiff, which, if existing, would sustain the action; or in other words, such as would defeat an action of *trespass* if brought in place of this, in case of wrongful taking, or *trover* if brought for a wrongful detention. All that can be material for the plaintiff to maintain against a plea in bar is *an interest in or connection with* the property, which would give to him the action of replevin as an appropriate remedy for a wrongful taking or detention.⁵

7. Whenever, by any statute, executors or other persons, suing in the right of another, are authorized to

¹ Johnson v. Carnley, 10 N. Y. R. 570; see Frost v. Mott, 34 N. Y. R. 253, at p. 257.

² Wood v. Orser, 25 N. Y. R., 348; see otherwise Neff v. Thompson, 8 Barb., 213.

³ Moffat v. Van Buren, 4 Bosw., 609.

⁴ Ingraham v. Hammond, 1 Hill, 353; Proser v. Woodward, 21 Wend., 205; Rockwell v. Saunders, 19 Barb., 473.

⁵ Rogers v. Arnold, 12 Wend., 30, per Nelson cited Johnson v. Carnley, 10 N. Y. R., 570.

maintain actions of trespass for any personal property wrongfully taken, such persons may maintain actions of replevin for such property.¹ But one partner cannot maintain the action against his copartner for partnership property;² nor can one tenant in common against his cotenant.³

8. Some conflict has existed in the courts, as to whether an action, under the Code, could be maintained, to recover the possession of personal property, when the defendant had not the possession, either in fact or in law, at its commencement.⁴ But it is now well settled that it can be; that notwithstanding the defendant has wrongfully parted with the possession, before suit brought, the action will lie.⁵ If the defendant has once been in possession, and has parted with that possession wrongfully, that is, without being authorized by law, he is liable in an action to recover possession.⁶ Thus the true owner may maintain an action to recover the possession of his property, or its value, against a person who has purchased it in good faith from the wrong doer, and has sold it in good faith, and without notice of the owner's rights, before the commencement of the action. And the purchaser of goods, from a person having no title nor right to sell, acts wrongfully in selling the same, though he make the sale in good faith, and in ignorance of the owner's rights.⁷ So, where the defendant, a jeweler, received from A a set of diamonds, supposing that A was the owner, and as his agent and for his accommodation negotiated the sale thereof to B and received and paid over to A the pro-

¹ 3 R. S. (5th ed.) 845, § 2.

² *Azel v. Betz*, 2 E. D. Smith, 188.

³ *Russell v. Allen*, 3 Kern., 173.

⁴ The following cases hold that it cannot; *Roberts v. Randall*, 3 Sandf., 707; *Brockway v. Burnap*, 8 How., 188; 12 Barb., 357; *Elwood v. Smith*, 9 How., 528.

⁵ *Brockway v. Burnap*, 16 Barb., 309, reversing 12 Barb., 357; *Nichols v. Michael*, 23 N. Y. R. 264; *Ross v. Cassidy*, 27 How., 416.

⁶ *Id.*

⁷ *Ross v. Cassidy*, 27 How., 416; see also *Linnen v. Cruger*, 40 Barb., 633.

ceeds, in ignorance of the plaintiff's title, and without any charge for his services, it was held, that he was liable in an action of trover, to the true owner for the value of the property;¹ and since replevin in the *detinet* is a remedy concurrent with trover, the same state of facts would have sustained an action under this chapter.²

9. The action lies for a wrongful taking of goods, or in the *cepit*, whenever an action of trespass can be maintained for such wrongful taking;³ but the plaintiff must show that he was either in actual possession, or entitled to the immediate possession at the time of such taking.⁴ The action does not lie for a wrongful *taking*, against one, who innocently, and without fraud, obtains the goods from a wrongful taker; but he must show affirmatively that he came into possession of such goods, in good faith, and for a lawful purpose, or he will be considered as much a wrong doer as the taker, and will not be entitled to a demand before suit; but if it appears affirmatively that he came into possession in good faith and with the belief that he would acquire a good title, he will not be liable to an action of replevin at the suit of the owner, until a demand has been made, and an opportunity thus afforded him to restore the property.⁵

10. A mere levy upon personal property, by an officer, when it is not authorized by law, without either a sale or removal, is a trespass, and replevin lies against the officer who made the levy, and against the plaintiff who directed it.⁶ So of a levy under an execution, made after the return day.⁷ So, an actual levy and sale of personal pro-

¹ Dudley v. Hawley, 40 Barb., 397.

² See Barrett v. Warren, 3 Hill, 348; Ross v. Cassidy, 27 How., 416.

³ Allen v. Crary, 10 Wend., 349; Rogers v. Arnold, 12 Wend., 30; Stewart v. Wells, 6 Barb., 79; Brockway v. Burnap, 16 Barb., 309; and cases.

⁴ Redman v. Hendrick, 1 Sandf., 32; Stockwell v. Phelps, 34 N. Y. R., 363.

⁵ Tallman v. Turck, 26 Barb., 167; Barrett v. Warren, 3 Hill, 348; Nash v. Mosher, 19 Wend., 431.

⁶ Stewart v. Wells, 6 Barb., 79; Marsh v. Backus, 16 Barb., 483.

⁷ Vail v. Lewis, 4 John., 450.

perty, which belongs to a person who is not defendant in the execution, is a trespass, even though there is no actual interference with the property, and replevin will lie against both the officer and the purchaser, especially when the plaintiff in the execution is the purchaser; and the fact, that the officer professed to sell merely the right of the defendant in the execution, will not change the rule, for if the defendant in such execution have no right in the property, the act of selling will be a trespass.¹ So, an action lies, at the suit of A to recover possession of his property, taken by virtue of an execution, warrant or attachment against B,² even though the property when taken, was in the actual possession of B, provided the general property in the goods and the constructive possession be in A.³ So, where goods of the owner are taken by the sheriff from the owner's servant while employed in the owner's business, on an execution against such servant, the action lies at the suit of the owner.⁴ So, replevin lies against a plaintiff by whose direction an execution is levied upon the property belonging to another than the defendant in the execution.⁵ In such a case, the property taken is not in the custody of the law as regards the real owner; but only as between the plaintiff and the defendant in the execution.⁶ But where property of a firm was attached in an action, not against the *members* of the firm *literally*, but against *some of them*, it was held that claim and delivery could not be maintained.⁷

11. Whenever property is obtained from another fraudulently, the vendor, on discovering the fraud, may avoid the contract, and bring an action to recover possession of such property, unless it has passed into the possession of

¹ Neff v. Thompson, 8 Barb., 213.

² Judd v. Fox, 9 Cow., 259.

³ Dunham v. Wyckoff, 3 Wend., 280.

⁴ Clark v. Skinner, 20 John., 465;
Hull v. Tuttle, 2 Wend., 475.

⁵ Allen v. Crary, 10 Wend., 349;
Knapp v. Smith, 27 N. Y.R., 277.

⁶ Clark v. Skinner, 20 John., 467.

⁷ Smith v. Orser, 43 Barb., 187.

a *bona fide* holder for value.¹ But it is the general rule that the party that would rescind or disaffirm the contract must, return or offer to return, whatever he has received thereon, but such return may be made after suit brought and at the trial.² Where one fraudulently obtains property and afterwards makes a general assignment for the benefit of creditors, and such property goes into the possession of the assignee, a joint action lies against both assignor and assignee to recover possession of such property; but a demand should first be made of the assignee.³ So, an action to recover possession of property fraudulently purchased lies against a third party after demand, who takes such property from the vendee as security for an antecedent debt.⁴ It lies also where the creditor obtains his title by a levy and sale on an execution against the property of the vendee, for an antecedent debt.⁵ So, if the vendee has mortgaged the property, the claim of the vendor will be preferred.⁶

12. The mortgagee of a chattel mortgage, whose title to the property has, by a default in payment, become absolute may maintain the action against one who wrongfully takes such property from the mortgagor.⁷ When there is a provision in the mortgage that the mortgagee may take possession at any time he deems himself insecure, he may maintain an action against a wrongful taker, although the money secured by the mortgage is not due.⁸ But, if by the terms of the mortgage, the mortgagor is to retain possession until default made, the mortgagee cannot maintain this action against a defendant who took

¹ Nichols v. Michael, 23 N. Y. R., 364; Hunter v. Hud. R. Ins. & M. Co., 20 Barb., 494.

² White v. Dodds, 28 How., 197.

³ Nichols v. Michael, 23 N. Y. R., 364; White v. Dodds, 28 How., 197.

⁴ Root v. French, 13 Wend., 570.

⁵ Mowrey v. Walsh, 8 Cow., 238.

⁶ Woodburn v. Chamberlain, 17 Barb., 446.

⁷ Fuller v. Aoker, 1 Hill, 473; Bank of Rochester v. Jones, 4 Coms., 497.

⁸ Chadwick v. Lamb, 29 Barb., 518; Stuart v. Taylor, 7 How., 251; Stewart v. Slater, 6 Duer, 84.

the mortgaged property by virtue of an execution or other process, before any default made.¹ So, where the mortgagor is to retain possession of the property, until default made in payment, unless the mortgagee shall sooner demand the same, the mortgagor may maintain an action to recover possession of such mortgaged property against the mortgagee, who took it without the knowledge or consent of the mortgagor, and without any demand of possession.²

13. A person, who has a valid lien on goods and chattels, may maintain this action, even against the owner who has fraudulently obtained possession thereof;³ as a common carrier, where a consignee of chattels obtains possession by a false and fraudulent promise to pay such common carrier the freight on delivery.⁴ But a voluntary surrender without fraud waives the lien.⁵ So, a vendor of goods, to be paid for on delivery, has a lien for the price, if they are not paid for when the delivery is completed, and there is no waiver of the condition.⁶

14. An action also lies against a vendee of goods sold conditionally, to recover possession of such goods, where the condition is not performed; as where goods are sold upon the condition that the title shall not pass until they are paid for;⁷ or where goods are sold to be paid for on delivery, which is not done, and there is no waiver of the condition.⁸ And such action lies against the creditor who receives such goods from the vendee to secure an antecedent debt; or against an assignee for the benefit of creditors; or against a purchaser from such vendee, with notice;⁹ or

¹ Redman v. Hendrick, 1 Sandf., 32.

² Newsam v. Finch, 25 Barb., 175.

³ Baker v. Hoag, 7 Barb., 113; 3 Seld., 555.

⁴ Bigelow v. Heaton, 6 Hill, 43.

⁵ McFarland v. Wheeler, 26 Wend., 467.

⁶ Palmer v. Hand, 13 John., 434.

⁷ Fleming v. McKean, 25 Barb., 474; Leven v. Smith, 1 Denio, 571, and cases.

⁸ Id.; Keeler v. Field, 1 Paige, 812; Russell v. Minor, 22 Wend., 659.

⁹ Id.; Haggarty v. Palmer, 6 John. Ch., 437.

where goods are to be paid for on delivery, against one who buys them from the vendee before delivery is completed.¹ So, upon a sale of merchandise for cash to be paid on delivery, the defendant offered the plaintiff's servant, who made the delivery, a note of the plaintiff's which had become payable, for nearly the amount, and cash for the residue, which the plaintiff declined to receive; the defendant refused to give up the goods, or pay the money; it was held, that no title passed, and that the plaintiff could maintain replevin for the property.² The vendor and vendee of chattels sold on condition that no title shall pass until payment, do not hold the relation of bailor and bailee simply; and a judgment recovered by the vendee against a trespasser for damages for taking and converting the chattels, will not bar a second action by the vendor for their value, after his right of possession reverts by non-payment.³

15. Where the taking was not wrongful and the action is based upon a wrongful detention of the property, or in the *detinet*, a demand must be made before suit is brought.⁴ The fact that the defendant has not the possession of the goods either in fact or in law at the time of the demand, will not defeat the action. If he has once been in possession, and has parted with that possession without lawful authority, he will nevertheless be liable.⁵ A purchaser of personal property, though in good faith and for a valuable consideration, obtains no title from a person who wrongfully took the same from the owner, and he is bound to deliver it to the owner on demand. He cannot rightfully deliver it to any person other than the owner; and having no title, acts wrongfully in selling the same, though he make the sale in good faith and in ignorance

¹ Palmer v. Hand, 13 John., 434.

² Leven v. Smith, 1 Denio, 571.

³ Hasbrouck v. Lounsbury, 26 N. Y. R., 598.

⁴ Fuller v. Lewis, 3 Abb., 383, 13 How., 219; Howell v. Kroese, 2 Abb., 167, 4 E. D. Smith, 357.

⁵ Ross v. Cassidy, 27 How., 416.

of the owner's rights. The true owner may maintain an action to recover the possession of his property, or its value against a purchaser who had purchased it in good faith from a wrong doer, and had sold it in good faith and without notice of the owner's rights, and before the commencement of the action.¹ Where the defendant, a jeweler, received from A a set of diamonds, supposing that A was the owner, and as his agent and for his accommodation negotiated the sale thereof to B and received and paid over to A the proceeds, in ignorance of the plaintiff's title, and without any charge for his services, it was held that he was liable, in an action of trover, to the true owner for the value of the property;² and since replevin in the *detinet* is a remedy concurrent with trover, the same facts would have sustained an action under this chapter.³ But it must be borne in mind that the innocent purchaser from a wrong doer, is not liable to an action to recover the possession of the goods until a demand has been made upon him and an opportunity thus afforded for him to return the goods.⁴ If chattels wrongfully in the possession of a testator or intestate continue still in specie, in the hands of his executor or administrator, replevin will lie against such executor or administrator to recover back the specific goods.⁵

16. The action of replevin does not lie for the recovery of any property taken by virtue of any warrant for the collection of any tax, assessment or fine in pursuance of any statute of this state; nor at the suit of any defendant in any execution or attachment to recover goods or chattels seized by virtue thereof, unless such goods or chattels

¹ Id; see also *Linnen v. Cruger*, 40 Barb., 633.

² *Dudley v. Hawley*, 40 Barb., 397.

³ See *Barrett v. Warren*, 3 Hill, 348; *Ross v. Cassidy*, 27 How. 416.

⁴ *Mellspaugh v. Mitchell*, 8 Barb., 333; *Tallman v. Turck*, 26 Barb., 167.

⁵ *Brown on Par.*, 285; *Le Masin v. Dixon*, Sir W. Jones, 173.

are exempt by law from such execution or attachment; nor shall replevin lie for such goods or chattels at the suit of any other person, unless he shall at the time have a right to reduce into his possession the goods taken.¹

17. The case must clearly fall within the provision forbidding replevin of goods taken for a tax, fine or assessment, or the action can be maintained. The property seized must be either the property of the person assessed, or the goods must be actually in his possession when seized. Where goods are seized and taken from the possession of the owner's servant on a warrant for tax or fine against another person the owner may maintain replevin to recover such goods. So, where the levy was made upon goods which the taxpayer or defendant in the warrant held for sale in commission, and which he had deposited with a warehouseman for storage, where they were seized, it was held that the warrant and levy did not divest the owner and that he could replevy them.² So, on a warrant for tax or fine against a member of a firm, possession by the firm is not possession by such member, within the meaning of the statute.³ But if the chattels are actually in the possession of the defendant in the warrant, the officer may seize them, and no action of replevin can be sustained by the owner, but the officer will be liable to an action of trespass or trover.⁴ The non-liability to replevin is not limited to property taken for any tax, fine or assessment in pursuance of any statute of this state, but extends to property so taken in pursuance of any statute of the United States. Thus property levied upon to collect a tax against the owner under the internal revenue act cannot be replevied.⁵

18. Where goods, belonging to a third person, are

¹ 3 R. S. (5th ed.), 845.

² Stockwell v. Veitch, 15 Abb., 412.

³ Id.

⁴ People v. Albany Com. Pleas, 7 Wend., 485; see also Sheldon v. Van Buskirk, 2 Comst., 473.

⁵ O'Reilly v. Good, 18 Abb., 106.

levied upon, by virtue of an execution or attachment against a defendant, in whose possession such goods happen to be, the owner may maintain an action to recover their possession, not only against the officer who levied, but also against the plaintiff who directed such levy.¹ And this is true, even though there is no actual interference with the property. The fact that the officer professed to sell only the right of the defendant in the execution, will not change the rule; for if the defendant in such execution have no right in the property, the act of selling will be a trespass.² Where goods of the owner were taken from the owner's servant, while employed in the owner's business, on an execution against such servant, the action lies at the suit of the owner.³ But the plaintiff must show right of possession at the time the action is commenced, and, therefore, the action will not lie where the property was originally wrongfully taken by the sheriff, but before the replevin action was commenced, had been levied on by him, by virtue of a legal execution.⁴ If the action of replevin is brought for an unlawful *taking*, the plaintiff must establish either that he was in actual possession, or that he was entitled to the immediate possession of the property at the time it was taken.⁶ So that, where an agent or factor has a right of possession, having a lien, the action cannot be maintained by the owner.⁶ But the lien, to be a defense, must be a legal and sufficient lien, or otherwise it will be unavailing.⁷ It is the policy of the law that property in the custody of the law should not be replevied; but where the property

¹ Knapp v. Smith, 27 N. Y. R., 277; Marsh v. Backus, 16 Barb., 483; Steward v. Wells, 6 Barb., 79; Neff v. Thompson, 8 Barb., 213.

² Neff v. Thompson, 8 Barb., 213.

³ Clark v. Skinner, 20 John., 465; Hull v. Tuttle, 2 Wend., 475.

⁴ Sharp v. Whittenhall, 8 Hill, 576.

⁵ Redman v. Hendrick, 1 Sandf., 32.

⁶ Wood v. Orser, 25 N. Y. R., 348; see otherwise Neff v. Thompson, 8 Barb., 213.

⁷ Moffat v. Van Buren, 4 Bosw., 609.

of one is taken on an execution or attachment against another, the property taken is not deemed to be in the custody of the law, as regards the real owner; but only as between the plaintiff and the defendant in the execution.¹ Where the property of a firm was attached in an action, not against the *members* of the firm *literally* as such, but against *some of them* individually, it was held that claim and delivery could not be maintained.²

19. So, the action will not lie at the suit of a third person, for goods belonging to him, but taken by the sheriff in a proceeding of claim and delivery, against one in whose possession they were. There is only one way in which a third party can assert his claim to chattels taken in pursuance of the provisions of this chapter, and that is by proceedings under section 216.³ But this section applies only where the property is taken by the sheriff in the proper discharge of his duty; as where the property of a stranger is taken from the possession of the defendant or his agent, and it is the property described in the affidavit and requisition. But if the property be not that described in the affidavit, or if the sheriff has taken it from the possession of any person other than the defendant or his agent, the true owner may maintain an action of trespass or replevin against the sheriff for a recovery of the property.⁴

20. One partner cannot maintain replevin against his copartner for partnership property;⁵ nor one tenant in common against his cotenant;⁶ nor can several persons having separate and distinct interests in a chattel maintain replevin therefor.⁷ Neither, by the common law, will the action lie against a corporation aggregate.⁸

¹ Clark v. Skinner, 20 John., 467;

² Smith v. Orser, 43 Barb., 187.

³ Edgerton v. Ross, 6 Abb., 189;
Stimpson v. Reynolds, 14 Barb.,
506.

⁴ King v. Orser, 4 Duer, 431.

⁵ Azel v. Betz, 2 E. D. Smith, 188.

⁶ Russell v. Allen, 3 Kern., 173.

⁷ 3 Harrington, 339.

⁸ Kyd on Corp., 205.

21. Right to the possession and dominion of the goods and chattels for the time, is essential to sustain an action of replevin; and, therefore, if such right be not in the plaintiff, he cannot succeed. It has long been settled, that, in replevin, the plea of property in a third person is good, and entitles the defendant to have a return thereof, without connecting himself with the right of such person. But the property, whether in the defendant or a stranger, sufficient to sustain a defense, must be such as goes to destroy the interest of the plaintiff; or, in other words, such as would defeat an action of *trespass*, or *trover*, if brought in the stead of replevin.¹ Thus, where goods are leased for a term, the lessor cannot, before the expiration of such term, maintain replevin for them against a third person; for during the term the title, that is, the right of possession, is in the lessee.² So, where the goods are in the possession of an agent or factor, who has a lien thereon for advances, the owner has not the title.³ But a lien set up as a defense to an action of replevin must be a legal and sufficient lien, or the defense will be unavailing.⁴ But where the plaintiff has actual possession of the property, coupled with an equitable interest therein, at the time of the seizure by the sheriff, and such seizure is made upon an execution against the former owner, the plaintiff may maintain the action, although the general property and the right of immediate possession are at the same time in a stranger, provided the defendant does not show any privity between himself and such stranger.⁵ Thus A bought certain chattels of B, with the condition that the property should belong to B until paid for; and

¹ Rogers v. Arnold, 12 Wend., 30; Johnson v. Carnley, 10 N. Y. R., 570; Ingraham v. Hammond, 1 Hill, 353; Prosser v. Woodward, 21 Wend., 205.

² Bruce v. Westervelt, 2 E. D. Smith, 440.

³ Wood v. Orser, 25 N. Y. R., 348; see otherwise Neff v. Thompson, 8 Barb., 213.

⁴ Moffat v. Van Buren, 4 Bosw., 609.

⁵ Johnson v. Carnley, 10 N. Y. R., 570.

A sold the same to C before he had paid B in full. Afterwards, on an execution against A, the sheriff seized said property, which was at the time in possession of A, and C brought an action to recover possession thereof. The court held that, inasmuch as the defendant showed no privity between himself and B, that the action could be maintained.¹ But, where an attachment upon which property was taken was not really against the plaintiffs, in the replevin suit, but only against some of them, it was held, that though the property of all the plaintiffs was taken, yet the action for a return was contrary to the spirit of section 207, subdivision 4, and could not be maintained.²

22. The Code expressly limits the remedy of claim and delivery to actions for the recovery of personal property, which term includes money, goods, chattels, things in action, and evidences of debt.³ It will often be difficult to determine whether an article is to be deemed personal, or real property. The line of demarkation between these two kinds of property is sometimes not easily drawn; and an article will often be found to assume the character of the one or the other according to the circumstances in which it is placed. If, however, the defendant has severed any fixture from the plaintiff's free hold, such fixture, after severance, becomes *personal property*.⁴ It is unnecessary in a work of this kind, to enter into an extended consideration of the subject of fixtures and therefore but a few of the leading cases will be noticed.

23. The questions as to what are personalty and what realty, arise chiefly between executors and administrators and heirs, landlord and tenant, vendor and vendee, and mortgagor and mortgagee; and it will be observed, that

¹ Johnson v. Carnley, 10 N. Y. R., 570.

³ Code, § 463.

² Smith v. Orser, 43 Barb., 187.

⁴ Cressen v. Stout, 17 John., 116; Gardner v. Finley, 19 Barb., 317.

articles that are treated as of one kind as between one class, are sometimes treated as of another kind, as between another class. But, ordinarily, the same general principle exists in all cases.

The statute regulating the question as between executors, administrators¹ and heirs-at-law, provides that the following among other property, shall be deemed personal, and go to the executors and administrators: Things annexed to the freehold, or to any building for the purposes of trade and manufacture, and not fixed into the walls of a house, so as to be essential to its support: the crops growing on the land of the deceased at the time of his death; and every kind of produce raised annually by labor and cultivation, except grass growing and fruit not gathered.¹ The policy which has created exceptions to the general rule, that whatever is affixed to the freehold cannot be removed without the consent of the owner of the inheritance, applies as well to erections for agricultural and other purposes, as to erections for the purposes of trade.

24. Growing crops, as wheat and corn and vegetables, which are the annual produce of labor and cultivation, are personal property; but, growing trees, fruit or grass, the natural produce of the earth, are parcel of the land itself and not chattels.² However, trees planted by a tenant, who has no freehold estate in the premises, for the purpose of transplanting and sale, as in the case of a nurseryman, may be regarded as personalty.³ So, hops, growing and maturing on the vines, which are produced by the annual cultivation of the owner, are personal property within the meaning of the statute of frauds.⁴

¹ 3 R. S. (5th ed.), 187, sub 4-5-6.

² *Green v. Armstrong*, 1 Denio, 550, and cases cited; but see *Lane v. King*, 8 Wend., 584; *Shepherd v. Philbrick*, 2 Denio, 174.

³ *Miller v. Baker*, 1 Metcalf, 27; *Whitemarsh v. Walker*, 1 Metcalf, 313.

⁴ *Frank v. Harrington*, 36 Barb., 415.

Though grass-growing, is in general, parcel of the realty, yet when it is owned by one who does not also own the land, it is personal property.¹

25. So, stills, kettles and tubs erected by a tenant of a distillery, though affixed to the building;² and engines and machinery in a mill, though firmly fixed to the building, put in by a tenant for the purpose of manufacturing;³ and looms in a factory, connected to the motive power by leather belts, and fastened to the floor by screws;⁴ also machinery for spinning flax or tow, and carding machines, used in manufacturing and attached slightly by cleats,⁵ are personal property and not part of the realty, where they can be removed without permanent injury to the freehold. So, gas fixtures owned by a tenant, though affixed to the building,⁶ and stoves temporarily attached, may be removed.⁷

26. But the keys of locks upon doors, fire-frames, doors, windows, blinds, mill-stones, and irons taken out of a mill for repairs; hop poles, though taken down for the purpose of gathering the hops; and rails of a fence, are part of the freehold.⁸ So, manure made upon the farm in the ordinary manner, even though lying in heaps in the barn-yard, is realty;⁹ but this does not apply to manure which is not the produce of agricultural land, such as accumulates in a livery stable. In the latter case it is personalty.¹⁰ So, if rails are built into a fence, by a tenant under an agreement for their removal, they are personal property.¹¹

¹ Smith v. Jenks, 1 Denio, 580.

⁷ Freeland v. Southworth, 24

² Reynolds v. Shuler, 5 Cow., 323.

Wend., 191.

³ Cook v. Champlain Trans. Co., 1 Denio, 91; Kelsee v. Durkee, 33 Barh., 410.

⁸ Farrar v. Stackpole, 6 Greenl., 154; Bishop v. Bishop, 11 N. Y. R., 123; Goodrich v. Jones, 2 Hill, 142.

⁴ Murdock v. Gifford, 18 N. Y. R., 28; see Martin v. Cope, 28 N. Y. R., 180.

⁹ Goodrich v. Jones, 2 Hill, 142; Middlebrook v. Corwin, 15 Wend., 169.

⁵ Cressen v. Stout, 17 John., 116.

¹⁰ Carroll v. Newton, 17 How., 189.

⁶ Lawrence v. Kemp, 1 Duer, 363.

¹¹ Mott v. Palmer, 1 N. Y. R., 564; Ford v. Cobb, 20 N. Y. R., 344.

27. If a man, having no estate in premises, erect thereon, by permission of the owner, a house, such house will be the personal property of the builder; but it will be otherwise if the builder have an interest in the land.¹ So, where a tenant erects a building for the more profitable, or comfortable enjoyment of the premises during his tenancy, where such building merely rests upon the soil, or is only slightly imbedded therein, and is removable without injury to the inheritance, it is personal property and may be removed.² As a ball-room, erected by a lessee of an inn, and which rests upon stone posts slightly imbedded in the soil, and which can be removed without injury to the freehold;³ or a cider mill and press, erected by a tenant, holding from year to year.⁴

28. And it may be stated as a general rule, that a tenant who makes additions to a freehold, or improvements upon it, for the better use or enjoyment of the land, while his interest continues, has the right to remove such additions and improvements at any time before his right of enjoyment expires, where such removal would not operate to the prejudice of the inheritance by leaving it in a worse condition than when the tenant took possession.⁵ To constitute a fixture, there must be such an annexation as to render a removal impossible without injury to the freehold.⁶

29. But the tenant must avail himself of his privilege to remove fixtures *during the continuance* of his term, for if he forbear to do it within that period, the law presumes that he voluntarily relinquishes his claim in favor of his landlord.⁷ Thus, where a tenant, at his own expense,

¹ Mott v. Palmer, 1 Comst., 571; 1 Wash. on Real Prop., 3; and cases.

² Dubois v. Kelley, 10 Barb., 496, and cases.

³ Ombony v. Jones, 5 E. P. Smith, 234; S. C., 21 Barb., 520.

⁴ Holmes v. Temper, 20 John., 29.

⁵ King v. Wilcomb, 7 Barb., 263;

Dubois v. Kelley, 10 Barb., 496; 2 Peters, 137.

⁶ Swift v. Thomson, 9 Conn. Rep., 63.

⁷ Amos and Ferard on Fixtures, 87; see Dubois v. Kelly, 10 Barb., 496; Holmes v. Temper, 20 John., 29, and cases.

provided and hung bells in the house, and afterwards quitted the house, without removing the bells, it was held that, though he might have removed them during the term, they vested in the landlord on the determination of the term.¹ But the tenant's right to remove fixtures will continue after the expiration of the original term, during such further period of possession by him, as he holds the premises under a right to consider himself as tenant.² However, if the tenant, at the close of his term, *renews his lease* and acquires a fresh interest, his right to remove such fixtures as he had under the old tenancy, a right to sever, is determined, unless he has reserved such right, and he is in the same situation as if the landlord, being seized of the land, together with the fixtures, had demised both to him.³ There are cases, also, in which, from the very nature of the tenancy, the lessee must have the privilege of removing fixtures after the termination of his interest; such as where he holds under any uncertain term, or contingency, as for life or upon the happening of an event. In such cases no presumption of gift arises, and the property still remains in the tenant. He, therefore, has the right of removing them after his term has ended, provided he exercise such right within a reasonable time.⁴ Another exception to the rule also prevails in favor of nurserymen, for in case of a letting of land for the purpose of nurturing trees and plants until they are ready to be transplanted, in the absence of any express agreement, the interest of the tenant in the land, for the purpose contemplated by the parties, will be held to continue until that purpose is accomplished; and the tenant will be allowed to cultivate the trees until they are prepared

¹ Lyde v. Russell, 1 Barn. & Ad., 394.

² Dubois v. Kelly, 10 Barb., 496; Weeton v. Woodcock, 7 Mess. & W., 14; Penton v. Robart, 2 East., 88.

³ See Taylor's Landlord and Tenant, § 552.

⁴ Id.

for transplanting, and then, from time to time, to remove them.¹

30. Replevin cannot, ordinarily, be maintained for taking and detaining things affixed to the freehold; but if after the sheriff has levied upon them, they are severed, they become personal property, and may be replevied.² So, if the defendant has severed any thing from the plaintiff's freehold, such fixture becomes personal property, and may be replevied.³

31. A man can have no property in animals *feræ naturæ*, until they are reclaimed, and then only a qualified property; so long as they are in his actual keeping, as deer in a park, or doves in a cote, his property in them continues. It continues, also, while they are in his constructive keeping; as where they wander away with the habit of returning. But if they stray without the habit of returning, his property ceases. If a deer has a collar, or other mark put upon it, and it goes and returns at pleasure, or if a wild swan or goose is marked and let loose upon a river, the owner's property still continues. So of wild geese, rendered so tame as to eat from the owner's hand; though they have twice strayed and have been brought back.⁴ A swarm of wild bees belongs to the person who first takes or hives it; but if a swarm flies from the hive of the owner to the land of another, the owner's qualified property in them continues, so long as he can keep them in sight, and possesses the power to pursue and identify them.⁵ If bees are found upon the land of another, the finder acquires no property in them by merely marking the tree with the initials of his name; nor can he maintain an action against one who cuts down

¹ See Taylor's Landlord and Tenant, § 552; King v. Wilcomb, 7 Barb., 263.

² Cressen v. Stout, 17 John., 116.

³ Id.; Gardner v. Finley, 19 Barb., 317.

⁴ Amory v. Fly, 10 John., 102.

⁵ Goff v. Kiltz, 15 Wend., 550.

the tree and carries them away.¹ The mortal wounding of a wild beast, by one not abandoning the pursuit, is such a possession as will give him a qualified property therein; and the animal so wounded cannot be fairly intercepted by another.²

32. Replevin lies generally for property improperly confounded with other property; and, under some circumstances, the whole may be taken. . Whatever alteration in form property may have undergone, the original owner may take it, in its new shape, if he can identify the original material.³ As where logs are sawed into boards; timber into rails; leather made into shoes; iron into bars, or into tools; the manufactured articles still belong to the original owner of the materials, and he may maintain replevin therefor.⁴ "If any one shall make wine of my grapes; oil of my olives; or garments of my wool, *knowing they are not his own*, he shall be compelled by action to produce the said wine, oil or garments."⁵ But, if the chattel come into the possession of an innocent holder, who, believing himself to be the owner, converts it into a thing of a different specie, as wheat into bread, olives into oil, or grapes into wine, the original owner cannot reclaim it. It is otherwise if the chattel retain its original form.⁶ Where corn is converted into whisky by a willful trespasser;⁷ or wheat into flour;⁸ or logs into boards;⁹ the original owner may replevy such property. Nor can a *willful* wrong doer acquire any property in the goods of another, by any change wrought in them by his labor and skill, however great the change may be, pro-

¹ Gillet v. Mason, 7 John., 16; Ferguson v. Miller, 1 Cow., 243.

² Pierson v. Post, 3 Caines, 175; Buster v. Newkirk, 20 John., 75.

³ Betts v. Lee, 5 John., 348; Curtis v. Groat, 6 John., 168.

⁴ Silsbury v. McCoon, 3 N. Y. R., 382.

⁵ Digest Jus., lib. 10, tit. 4, leg. 12, § 3.

⁶ Silsbury v. McCoon, 3 N. Y. R., 379.

⁷ Id.

⁸ Mallory v. Willis, 4 Comst., 76.

⁹ Wingate v. Smith, 20 Maine, 287.

vided it can be proved that the improved article was made from the original material.¹ Where one fraudulently mixes another's wheat with his own; or saws another's logs into boards and intermixes them with his own so that they cannot be distinguished, the owner may maintain replevin for all the wheat or boards.²

33. Where the owners of property voluntarily mingle them, so that they cannot be distinguished; as where they mingle wheat, they become tenants in common,³ and neither can maintain replevin against the other.⁴

34. In an action under this chapter, the plaintiff may recover such damages as arise from the depreciation of the goods, during the wrongful detention by the defendant; and it is unimportant whether the decrease in value arises from the defendant's acts, or default, or from other causes.⁵ It is not essential that specific damages be alleged in the complaint, in order to recover damages from depreciation, resulting from lapse of time. Under a complaint alleging the wrongful taking and detention to the plaintiff's damage a specific sum, special damages for such depreciation will be allowed. Under such complaint evidence that the property depreciated, from change in the market value, or from decay from inherent causes, and not resulting from any neglect or default on the part of the defendant is admissible.⁶ If the defendant has given the required bond and retained possession of the goods, the jury should assess the value of the property at the time of the verdict and its depreciation since the taking, and interest should be allowed on the whole amount. The amount of depreciation and interest will form the

¹ *Silbury v. McCoon*, *supra*.

² *Wingate v. Smith*, 20 Maine, 287; *Hart v. Ten Eyck*, 2 John. Ch., 62, 108; *Frost v. Willard*, 9 Barb., 440.

³ *Newton v. Colt*, 6 Hill, 461.

⁴ *Russell v. Allen*, 3 Kern., 173.

⁵ *Young v. Willett*, 8 Bosw., 486; *Rowley v. Gibbs*, 14 John., 385; *Sugdam v. Jenkins*, 3 Sandf., 614, 644.

⁶ *Young v. Willett*, 8 Bosw., 486.

damages; and the judgment will be for the recovery of possession and the damages, or in case delivery cannot be had, for the value at the time of the verdict and the damages.¹

35. In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof; and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention, or taking and withholding such property.² When the plaintiff succeeds in the action, a general verdict is proper: 1st. Where there has not been a delivery of the property to the plaintiff, and the answer does not deny the value of the property claimed to be as stated in the complaint. 2d. Where the property has been delivered to the plaintiff, and the answer does not claim a redelivery.³ Where the property has been delivered to the plaintiff he cannot elect to take judgment for the value; and where it has not been delivered to him, the judgment must be in the alternative.⁴ Where the interest of a party, in the property claimed, is of a limited nature, and is less than the actual value of such property, the jury should, as between the party having such interest and the owner, assess the value of the property at such sum only as will be equivalent to the limited interest of the prevailing party.⁵ Thus, where a sheriff levies upon property by virtue of an execution, he has a special interest therein, as against the owner, to the amount due upon the execution, including his fees;

¹ Young v. Willett, 8 Bosw. 486.

² Code, § 261.

³ Archer v. Boudinet, 1 Code Rep., N. S., 372.

⁴ Rockwell v. Saunders, 19 Barb., 474.

⁵ Rhoads v. Woods, 41 Barb., 471, 476; 21 id., 300.

and if the debtor bring replevin against the officer, and the latter has a verdict in his favor, the jury should assess the value of the property at that amount.¹ But a party having only special property in a chattel, may recover its full value of a person who wrongfully takes or converts it, if such person is not the general owner or some one acting under his authority.² Where judgment is for the defendant, it must, likewise, be in the alternative, for he cannot elect to take judgment for either a return or the value.³

36. The judgment, if for the plaintiff, must be for the possession of the property claimed, or for the recovery of possession, or the value thereof, in case a delivery cannot be had, and of damages for the detention; or, if for the defendant, for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.⁴ The plaintiff cannot elect, as under the revised statutes, to take judgment for the value of the property, but is entitled only to a judgment in the alternative as provided by this section.⁵ So, if the verdict be for the defendant, and the plaintiff has possession of the goods, the judgment must be in the alternative, for a return of the property or the value thereof, in case a return cannot be had.⁶ Where the judgment is for the value absolutely, instead of in the alternative, it is an irregularity only, which does not invalidate the judgment, but which may be corrected by the court of original jurisdiction, though not reviewable on appeal.⁷

¹ *Seaman v. Luce*, 23 Barb., 240.

² *Alt v. Weidenberg*, 6 Bosw., 176;
see *Frost v. Mott*, 34 N. Y. R., 253;
Johnson v. Carnley, 10 N. Y. R., 579.

³ *Glann v. Younglove*, 27 Barb., 480.

⁴ Code, § 277.

⁵ *Fitzhugh v. Wiman*, 5 Seld., 559,

562; *Dows v. Rush*, 28 Barb., 158, 187.

⁶ *Dwight v. Enos*, 5 Seld., 470;
Seaman v. Luce, 23 Barb., 240;
Glann v. Younglove, 27 Barb., 480.

⁷ *Ingersoll v. Bostwick*, 22 N. Y. R., 425; *Johnson v. Carnley*, 10 id., 570; see 4 Bosw., 94.

37. If the plaintiff in the action recover less than fifty dollars damages, he shall recover no more costs than damages, unless he recovers also property, the value of which, with the damages, amounts to fifty dollars, or the possession of property be adjudged to him, the value of which, with the damages, amounts to fifty dollars.¹ Where the plaintiff recovers costs, even though it be only six cents, the defendant is not entitled to costs, for by section 305 costs are given to the defendant only in those cases where the plaintiff is not entitled to recover; and it is the same, although no proceedings are taken by the plaintiff to obtain possession of the property pending the action.² But where the plaintiff had a verdict for a return of a portion of the property assessed at two hundred dollars in value, and the defendant a verdict for the residue, it was held that each party might recover costs against the other.³

38. The execution to be issued upon a judgment in this action, is the same as in ordinary actions, except it substantially requires the officer to deliver the possession of the property, particularly describing it, to the party entitled thereto, and may, at the same time, require the officer to satisfy any costs, damages or rents and profits recovered by the same judgment out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered to be specified therein; if a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and shall, in that respect, be deemed an execution against property.⁴

39. An action for the recovery of specific personal

¹ Code, § 304, sub 4.

² Corbin v. Milton, 27 How., 76.

³ Porter v. Willet, 14 Abb., 319.

⁴ Code, § 289.

property wrongfully detained, against a sole defendant, wholly abates if the defendant dies before verdict or judgment; and the court has no power in such case to order the action to be continued against the personal representatives of the defendant.¹

40. A plaintiff may, as a general rule, discontinue his action, on payment of costs merely; but he cannot do so in an action where he has obtained possession of the property claimed. If, in such a case, the plaintiff neglect to proceed *before issue*, the defendant may, under section 274, have judgment for a dismissal of the complaint, for his costs, and for a return of the goods: or if the neglect to proceed is after issue, the defendant may notice the cause for trial under section 258, and have a dismissal of the complaint, verdict or judgment as the case may require. An order that the complaint be dismissed, unless the plaintiff bring the cause to trial within a specified time, is improper in such a case. Or if the plaintiff serves notice of discontinuance at any stage, the defendant may accept it, and sue on the undertaking given by the plaintiff, on procuring a delivery of the property to him.²

¹ Hopkins v. Adams, 6 Duer, 685;
5 Abb., 351.

² Wilson v. Wheeler, 6 How., 49;
Schroeder v. Kohlenback, 6 Abb., 66.

SECTION II.

THE AFFIDAVIT.

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|---|--|
| 1. § 207. Affidavit and its requisites. | 9. Cause of detention. |
| 2. Who may make. | 10. Not taken for tax, etc., property exempt. |
| 3. When should not be entitled. | 11. Value of property. |
| 4. Facts, how stated. | 12. Affidavit may be controverted by defendant. |
| 5. Ownership, how stated. | 13. Amendment of affidavit. |
| 6. Specific property. | 14. Requisition to sheriff to take and deliver the property. |
| 7. Property, how described. | |
| 8. Wrongful detention. | |

1. "Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing, 1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth. 2. That the property is wrongfully detained by the defendant. 3. The alleged cause of the detention thereof, according to his best knowledge, information and belief. 4. That the same has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or if so seized, that it is, by statute, exempt from such seizure. 5. The actual value of the property."¹ (For form, see appendix Nos. 40, 41, 42).

2. An affidavit is essential in every case where the remedy of claim and delivery is sought; and the proceeding being statutory in its nature, every requisite prescribed must be strictly complied with. Any one cognizant of the facts may make the affidavit. It matters

¹ Code, § 207.

not so much who is the witness, as it does that the evidence be sufficient.

3. Where the affidavit is made prior to the commencement of the action, it should not be entitled; but if it be entitled, the entitling will be treated as a nullity under section 176.¹

4. Every requisite fact must be positively stated in the affidavit, except the grounds upon which the defendant claims the property, which may be to the best of the affiant's knowledge, information and belief. The principle in regard to affidavits in this proceeding is similar to that in relation to affidavits for an arrest, or attachment. The facts must be so stated, as that the court, if called upon, can say upon the facts, and the best apparent evidence of these facts, that a clear right to the remedy is made out.²

5. When the plaintiff makes claim to the property as owner, a direct and positive allegation that he is the owner, is sufficient, without setting out the facts proving such ownership.³

6. But when the plaintiff claims possession by virtue of a special property, the facts which entitle him to such possession must be set out. When any fact, or the evidence of any fact, is based upon any writing or official document, such writing or document should be set forth as the basis of the conclusion. Thus, where a plaintiff claims immediate possession by virtue of written articles of copartnership between himself and another, such articles of copartnership must be set out as a part of the affidavit.⁴

7. The property must be particularly described in the affidavit. A mere general description will be insufficient, where one more definite can be given. It must be as particular as the knowledge of the plaintiff, or affiant,

¹ *Pindar v. Black*, 4 How., 95.

² *Depew v. Leal*, 2 Abb., 131.

³ *Burns v. Robbins*, 1 Code R., 62;

Vandenburgh v. Valkenburgh, 8 Barb., 217.

⁴ *Depew v. Leal*, 2 Abb., 131.

can, reasonably, enable it to be. Where chattels cannot be particularly described, by reason of their similitude to other and like articles, such as coal, or corn, or hay, a description as to the quantity, location, etc., must be given. Where the description was "about 400 tons of bog ore," the court held that the sheriff should have refused to execute the writ, on account of the vague and indefinite description. The property must be so described either by its individuality or by its location, quantity and the like, that the sheriff may identify it, when found and feel justified in taking it.

8. The affidavit must, likewise, state, not only that the property is detained by the defendant, but that it is wrongfully detained by him. It will be sufficient to allege directly and positively, in the language of the statute, that the property is wrongfully detained. It is also proper to state that the property is wrongfully detained by the defendant, even though he has parted with the possession; for it is well settled that this proceeding lies against a defendant, although he has parted with the property before suit brought.¹

9. The cause of such detention must be set forth according to the affiant's best knowledge, information and belief; and it should be stated with sufficient fullness, to make it clearly appear. (See forms Nos. 40, 41).

10. A simple allegation that the property has not been taken, where such is the fact, for a tax, assessment, or fine pursuant to a statute; nor seized under an execution, or attachment against the property of the plaintiff, will be sufficient. There is a conflict of opinions in the courts, as to whether, if the property have been taken on execution or attachment, a bare allegation that it is exempt would be sufficient, without stating, in detail, the facts

¹ Brockway v. Burnap, 16 Barb., R., 264; Ross v. Cassidy, 27 How., 309; Nichols v. Michael, 23 N. Y. 416.

bringing it within a statutory exemption.¹ An allegation of exemption made on *belief*, is clearly insufficient; unless it appear that such belief is founded on a knowledge of the law, or the advice of counsel, cognizant of all the facts in the case.² It is obviously, the better course, in all cases, to state the facts, with sufficient detail, to show that the conclusion of law as to exemption is based upon adequate grounds, and not upon the mere *ipse dixit* of the party. Where a portion only of the property of the same description is exempt the debtor must make his election, and claim the specific portion, so as to give the officer an opportunity to return it; or he cannot maintain his action.³ (See form No. 42).

11. The actual value of the property must be given according to the best estimate that can be made. Some value, must, in all cases, be stated, but it may be contingent, and have reference to extrinsic circumstances. Thus, replevin has been maintained for a warehouse entry, though bearing no actual value on its face, on the ground that it might turn out, in connection with evidence given on the trial, to be of value.⁴

12. The defendant may controvert the truth of the allegations in the plaintiff's affidavits. Thus, where the plaintiff made the usual allegation in his affidavit that the property was not taken for a tax, assessment or fine, pursuant to a statute, a motion to set aside the proceedings was granted upon affidavit showing that the defendant was a deputy collector of internal revenues for the United States, and that the property was taken for an assessment or tax under the internal revenue act.⁵

13. On motion to set aside the proceedings for defects in the affidavits, the court may, in a proper case, allow an

¹ Spalding v. Spalding, 3 How., 297; Roberts v. Willard, 1 Code R., 100.

² Id.

³ Seaman v. Luce, 23 Barb., 240.

⁴ Knehue v. Williams, 1 Duer, 597.

⁵ O'Reilly v. Good, 42 Barb., 521; 18 Abb., 106.

amendment; and it may also allow additional affidavits to be read in support of the original one.¹ A general appearance in the action, or obtaining a rendition, waives all irregularities in the affidavits.²

14. The affidavit having been prepared and sworn to, "the plaintiff may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant and deliver it to the plaintiff."³ The practice is for the plaintiff's attorney to make the indorsement in his own name as attorney, and this is undoubtedly proper. (See form No. 43).

¹ Depew v. Leal, 2 Abb., 131, and 248; Wis. Ins. Co. v. Hobb, 22 cases cited; Clickman v. Clickman, How., 494.

³ How., 365.

³ Code, § 208.

² Id., Hyde v. Patterson, 1 Abb.,

SECTION III.

SECURITY BY PLAINTIFF — REQUISITION, AND HOW EXECUTED.

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|---|---|
| <ol style="list-style-type: none"> 1. § 209. Security by plaintiff. 2. Form of undertaking. 3. Sheriff cannot dispense with undertaking. 4. Amendment of undertaking. 5. Liability of sureties. 6. Where non-resident is plaintiff. 7. Action on undertaking. 8. Qualification of sureties. 9. Undertaking, how disposed of. 10. <i>Seizure</i> of property by sheriff. | <ol style="list-style-type: none"> 11. Can only be taken from defendant or servant. 12. When protected by process. 13-15. § 214. <i>Property how taken when concealed in buildings.</i> 16. When sheriff a trespasser. 17. Service of copies on defendant. 18. Sheriff's return. 19. § 215. <i>Property, how kept.</i> 20. What care sheriff should use. 21. When the property to be delivered to plaintiff. |
|---|---|

1. "Upon the receipt of the affidavit and notice with a written undertaking, executed by one or more sufficient sureties approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall, also, without delay, serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion."¹

2. The undertaking must be in writing, but it is not

¹ Code, § 209.

essential that it be under seal or that it be in any particular form, so that it state all the facts and conditions required by the above section. It must be executed by the plaintiff with one or more sufficient sureties; or by one or more sufficient sureties without the plaintiff.¹ The sheriff is to exercise a discretion as to whether there shall be only one or more than one, and, also, as to their sufficiency; and he must indorse his approval in writing on the undertaking.² The sureties must justify, and the undertaking must be duly proved or acknowledged, in like manner as deeds of real estate.³ But an omission to comply with this rule may be remedied by amendment,⁴ (See forms Nos. 44, 45).

3. It is not in the power of the sheriff to dispense with the undertaking; and if it be not executed and delivered to the sheriff the proceedings will be irregular.⁵

4. If the sheriff originally intended to require two sureties, he may require another name to be inserted in the place of that of the plaintiff, before he approves; but no change can be so made without the consent of the original surety. The statute provides that whenever any bond, required by law to be given by any person, in order to entitle him to any right or privilege conferred by law, or to commence any proceeding, shall be defective in any respect, the court, officer, or body, who would be authorized to receive the same, or to entertain any proceedings in consequence of such bond, if the same had been perfect, may, on the application of all the obligors therein, amend the same in any respect, and such bond shall thereupon

¹But see as to plaintiff's being surety, *Burns v. Robbins*, 1 Code R., 62.

²Id.; Sup. Court, rule 6.

³Sup. Court, rule 6; *Anon.*, 4 How., 290.

⁴See *Conklin v. Dutcher*, 5 How., 386; *Bellinger v. Gardiner*, 12 How., 381.

⁵*Wilson v. Williams*, 18 Wend., 581.

be deemed valid from the time of the execution thereof.¹ This provision applies to undertakings in this action.² If an amendment is made by adding a new surety, his liability will be the same as though he had signed the bond originally.³

5. The liabilities of the sureties are clearly defined by the statute. They are responsible for a prosecution of the suit, for a return of the property to the defendant if return thereof be adjudged, and for the payment of such sum as may, *for any cause*, be recovered against the plaintiff. If an appeal be taken by either party to the supreme court at general term, or to the court of appeals, and judgment be given against the plaintiff, the sureties will be liable for all the costs.⁴

6. It was held in one instance that if a foreign corporation, or non-resident is plaintiff, an undertaking pursuant to this section dispenses with the security for costs required by the revised statutes,⁵ but in another case that conclusion is denied, and the reverse held.⁶

7. The defendant may bring an action on the undertaking without any assignment thereof to him. And if the defendant recovers in the replevin suit and assigns his judgment and all moneys to be recovered thereon, such assignment carries with it the undertaking, and the assignee may maintain an action thereon.⁷

8. The qualifications of sureties and their justification shall be as are prescribed by section 194 and 195 in respect to bail upon an order of arrest.⁸

¹ 3 R. S., 870, §§ 35, 36 (5th ed.); Shaw v. Lawrence, 14 How., 94; Potter v. Baker, 4 Paige, 290; Hyde v. Patterson, 1 Abb., 248.

² Newland v. Willetts, 1 Barb., 20.

³ Decker v. Judson, 16 N. Y. R., 439.

⁴ Tibbles v. O'Connor, 28 Barb., 538.

⁵ Wis. Ins. Co. v. Hobbs, 22 How., 494.

⁶ Boucher v. Pia, 14 Abb., 1.

⁷ Bowdoin v. Coleman, 3 Abb., 431.

⁸ Code, § 213; see ante, chap. I, sects. XI, XII.

9. After the sureties shall have justified, the sheriff shall deliver the undertaking to the defendant.¹

10. On receipt of the affidavit and notice indorsed thereon, and the undertaking, the sheriff, having first indorsed his approval on the latter, must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. The requisition is directed to and must be executed by the sheriff of the county where the property is situated. A sheriff has no authority to execute it out of his county. He should be careful not to take any property but that described in the affidavit; and to take no more than is therein described. If the description is not sufficiently definite to enable him to identify the goods, he may refuse to execute the process.

11. He has no right to take the property from the possession of any person other than the defendant, or his agent; and if he do so he will be a trespasser. If he take the goods from the possession of any other than the defendant, the burden of proof to establish an agency is on the officer. The remedy provided by section 216, applies only to cases where the property has been taken from the defendant or his agent, and not where it has been wrongfully taken.²

12. The sheriff is protected by the process in taking from the possession of the defendant the specific goods described in the affidavit, even though such goods belong to a third person; and the owner must resort to the remedy as provided by section 216; and he may also have an action against the issuer or instigator of such process.³

13. "If the property or any part thereof be concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the

¹ Code, 423.

² King v. Orser, 4 Duer, 436.

³ Foster v. Pettibone, 20 Barb., 350.

building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county."¹

14. The demand should be made in a manner most likely to come to the knowledge of any person that may be within the building, either at the door or window if any one within be in sight, or by knocking or ringing at the door. Should the sheriff be compelled to break open the building, he should do the least damage possible. He may also break into any inner room, or into any trunk, box, chest or drawers, where the property would be likely to be found.

15. But it must be remembered that the statute does not authorize the breaking open of a building unless the property be concealed therein. The only justification of the officer is the finding of the property in the building. No matter how strong his suspicions may be, or how much reason he may have to believe that the property is concealed in a building, he acts at his peril, and if he does not find it therein, the breaking will be trespass. The rule is the same as that relating to breaking buildings in cases of attachment.²

16. So, if the process is defective on its face, or if the sheriff is attempting to take property not described in the process; or if he take the property from the possession of any other than the defendant or his agent, he and all who act in his assistance will be trespassers.³

17. If the defendant can be found within the county, the sheriff shall, without delay, serve upon him, a copy of the affidavit, notice and undertaking, by delivering the same to him personally. If the defendant cannot be found, then such services must be made upon his agent from

¹ Code, § 214.

² See post, chap. iv, sec. vi.

³ Elder v. Morrison, 10 Wend., 128; King v. Orser, 4 Duer, 431.

whom the property is taken.¹ But the service should never be made on the agent, if the defendant himself can be found within the county. If neither the defendant nor his agent can be found, then the service may be made by leaving such copies at the usual place of abode of either with some person of suitable age and discretion.

18. The sheriff, in making his return should state the manner in which the copies were served, whether on the defendant personally, or on his agent having possession of the goods, or at whose house and with whom, the copies were left. In making such return he is acting ministerially, and is liable to the injured party for an error therein.²

19. "When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same."³

20. The sheriff is an officer whom the parties are compelled to employ, and he should use great care and diligence in preserving the property while in his possession. He will be responsible for any negligence or want of skill, either of himself or of his agent, by which the goods are damaged or lost; and he would probably be held responsible for a higher degree of vigilance and care, than an ordinary bailee for hire.⁴ He should be held to at least the same vigilance as he would in the care of property taken on execution or attachment, for which see post ch. IV, sec. VI.

21. If the defendant do not except to the plaintiff's sureties, nor demand a return of the property within three days after the service upon him of the affidavit, notice

¹ Code, § 209, ante pl. 1.

² See *Houghton v. Swarthout*, 1 Denio, 589, and cases cited.

³ Code, § 215

⁴ *Moore v. Westervelt*, 21 N. Y. R., 103; see same case in Superior Court, 2 Duer, 59; 1 Bosw., 358.

and undertaking; and if the property is not claimed by a third party within that time, the plaintiff becomes entitled to the possession of the property, and his right to such possession is absolute.¹ But if the defendant except to the plaintiff's sureties, the sheriff should retain the property until they have justified.² If the property be demanded by the defendant, and the required undertaking be given, the sheriff must still retain the possession of the property until the defendant's sureties have justified; or if they fail to justify at the time and place appointed, he must deliver possession to the plaintiff.³

¹ McCann v. Thompson, 13 How., 380.

² Moore v. Westervelt, 21 N. Y. R., 103; opinion at p. 108.

³ Graham v. Wells, 18 How., 376.

SECTION IV.

EXCEPTION TO, AND JUSTIFICATION OF, PLAINTIFF'S SURETIES.

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|---|---------------------------------------|
| 1. § 210 of Code. Exception to sureties. | 4. Sheriff when liable to defendant. |
| 2. Notice of exception to be given within three days. | 5. When the sureties fail to justify. |
| 3. Justification of sureties. | 6. Undertaking, how disposed of. |

1. "The defendant may, within three days after a service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice, in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived as above provided, or until they shall justify, or new sureties shall be substituted and justified. If the defendant except to the sureties, he cannot reclaim the property, as provided in the next section."¹

2. The defendant has three days after the service of the affidavit, etc., upon him, in which to determine whether the plaintiff or himself shall retain the property during the pendency of the action. If he elect to leave it in the plaintiff's possession, and is not entirely satisfied with the plaintiff's sureties, he must serve a notice in writing, within the three days, to the effect that he excepts to the sufficiency of such sureties. Should he omit to give such notice within the time, he will be deemed to have waived

¹ Code, § 210.

all objection to the sureties, and the sheriff will be discharged from liability. (For form, see No. 45).

3. On receipt of such notice the sheriff or plaintiff may, within ten days, give notice to the defendant of the justification of the sureties, before a judge of the court or a county judge, at a time not less than five nor more than ten days thereafter. The qualification of sureties, and the manner of their justification, shall be as are prescribed by sections 194 and 195, in respect to bail upon an order of arrest,¹ and new sureties may be substituted in like manner. But if one of the sureties fail to justify, and a new surety is substituted, a new undertaking should be executed. The original undertaking cannot be altered by inserting therein a new surety without the consent of the other surety, and of those for whose benefit or protection it is required to be given.² All the sureties must justify or the undertaking will be irregular.³

4. The sheriff remains liable to the defendant until the sureties have justified or the defendant has waived a justification. If the sureties fail to justify, the sheriff becomes surety and is responsible to the defendant.⁴ There is a *dictum* to the effect that where there is a failure to justify, the defendant is without remedy, except the responsibility of the sheriff, and that, if the defendant does not demand a return of the property, the plaintiff becomes absolutely entitled to it at the expiration of three days, even though the sureties have been excepted to.⁵ This interpretation may be sustained by a strict and literal construction of section 211; but it is open to grave objections. The provision for justification would become a mere recommendation. The plaintiff would accomplish his object by getting hold of the property, and would gain

¹ Code, § 213.

² Cobb v. Lackey, 6 Duer, 649.

³ Graham v. Wells, 18 How., 376.

⁴ Manley v. Patterson, 3 Code R., 89.

⁵ Manley v. Patterson, *supra*.

nothing by justifying his sureties. It would seem to be the better course for the sheriff to retain possession of the property until the justification of the sureties; and if the sureties failed, from any cause, to justify, that the defendant should get an order to show cause why the proceedings upon the provisional remedy should not be set aside. A motion to have the action discontinued for such irregularity would be improper, as this remedy does not affect the merits of the action.¹

5. It is no defense to an action by the defendant against the sureties that, having been excepted to, they failed to justify. The bringing suit on the undertaking may be regarded as a waiver of the exception.² But in a later decision as to the liability of the sureties in an undertaking given on arrest, where the sureties were excepted to and failed to justify, the same court held that unless the bail, after being excepted to, justify, their liability on the undertaking ceases; and that they are liable to the sheriff only for damages, and not on contract. The liabilities of sureties are similar in both cases, and it would seem that if the conclusion were proper in the one case it would be in the other.³

6. When the sureties have justified, the sheriff must deliver the undertaking to the party for whose benefit it was taken.⁴

¹ See *Moore v. Westervelt*, 21 N. Y. R., at p. 108.

² *Decker v. Anderson*, 39 Barb., 346; *Van Duynev. Coope*, 1 Hill, 557.

³ *Clapp v. Schutt*, 29 How., 255; 44 Barb., 1.

⁴ Code, § 423.

SECTION V.

REDELIVERY TO DEFENDANT.

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| 1. § 211. Defendant, when entitled to redelivery.
2. At any time before the expiration of three days.
3. Undertaking.
4. Qualifications of sureties.
5. § 212. <i>Justification of defendant's sureties.</i> | 6. Plaintiff need not except to sureties.
7. Sheriff to retain property.
8. Undertaking, how to be disposed of.
9. Undertaking evidence of possession.
10. Property cannot be returned to plaintiff.
11. Action on the undertaking. |
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1. "At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of the notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 216."¹ (See form No. 47).

2. The construction given to the first clause of the section is that the defendant may require a return at any time before the plaintiff is entitled to a delivery; and, as the plaintiff is entitled to a delivery after the expiration of three days from the notice, the defendant must claim a return within that time.²

¹ Code, § 211.

² *McCann v. Thompson*, 13 How., 380.

3. For the purpose of procuring the return, the defendant must give to the sheriff a written undertaking to the effect provided by the above section. The form of the undertaking will be the same as that given by the plaintiff, with the relative positions of the parties reversed; and it may be made either to the sheriff or the plaintiff.¹ (See form No. 46).

4. The qualifications of the sureties are the same as are prescribed for bail upon an order of arrest;² that is, each of them must be a resident and householder, or freeholder, within the state, and worth double the amount specified in the plaintiff's affidavit, exclusive of property exempt from execution; but the judge, or justice of the peace, on justification, may allow more than two sureties to justify severally in sums less than that in the undertaking, which is to be double the value of the property as stated in the affidavit of the plaintiff, provided the whole justification be equivalent to that of two sufficient bail.³

5. "The defendant's sureties, upon a notice to the plaintiff of not less than two nor more than six days, shall justify before a judge or justice of the peace, in the same manner as upon bail on arrest; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties, until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff."⁴

6. It is not necessary for the plaintiff to except to the defendant's sureties, as they are bound to justify in any case, before the property can be returned to the defend-

¹ Slack v. Heath, 4 E. D. Smith, 95; Decker v. Judson, 16 N. Y. R., 443.

² Code, § 213.

³ Graham v. Wells, 18 How., 376; see ante, chap. I, sec. XI.

⁴ Code, § 212.

ant; nor is any specific period limited within which the justification must take place, but the plaintiff must have notice of not less than two, nor more than six days. This notice must be in writing and should be entitled in the action.

7. The sheriff is to retain possession of the property until the justification has been completed; or until it has been expressly waived by the plaintiff; but in case the sureties fail to justify at the time and place appointed, the sheriff should deliver the property to the plaintiff. The sheriff cannot withhold the property from the defendant because the sureties in the affidavit attached to the undertaking, deposed to being worth a less sum than the amount required, if afterwards, on justification, they justify in the required amount.¹

8. After the sureties shall have justified, the sheriff shall deliver the undertaking to the party for whose benefit it was taken.²

9. Where the defendant claims a redelivery, and gives an undertaking under this section, which undertaking states that he, defendant, requires a return of the property, such undertaking is competent evidence to go to the jury to disprove an allegation in the answer that the defendant does not detain the property. It is for the jury to say how much weight such an undertaking is entitled to.³

10. There is no provision for a restitution of the property to the plaintiff, after it is redelivered to the defendant. No further change can be made before judgment, but in a proper case a court of equity will interpose, by injunction, for the preservation and protection of the property in the hands of the defendant; but not for a restitution of the property to the plaintiff. An injunction may

¹ Grant v. Booth, 21 How., 354.

³ Black v. Foster, 28 Barb., 387.

² Code, § 428.

be granted restraining the defendant from injuring or disposing of the property.¹

11. Where the plaintiff brings an action on the above undertaking, he is not required to aver or prove the regularity of the proceedings in the replevin suit. Nor is it necessary to aver the issuing of an execution against the property of the defendant, and its return unsatisfied. The parties to the undertaking are bound absolutely for the payment of the judgment, and must see to it that such payment is made.²

¹ Hunt v. Mootry, 10 How., 478; Erpstein v. Berg, 13 How., 91.

² Slack v. Heath, 4 E. D. Smith, 95.

SECTION VI.

CLAIM BY THIRD PERSON; FILING PAPERS; SETTING ASIDE PROCEEDINGS; ARREST OF DEFENDANT, ETC.

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| 1. § 216. Claim of property by third person. | 10. Moving to set aside proceedings. |
| 2-3. When the section applies. | 11. Amendment of affidavit. |
| 4. When sheriff must prove agency. | 12. Discontinuance of action. |
| 5. The affidavit of third person. | 13. When the action abates. |
| 6. Sheriff to notify plaintiff. | 14. Arrest of defendant. |
| 7. Undertaking by plaintiff. | 15. When he may be arrested. |
| 8. Sheriff to file papers. | 16. Not discharged because plaintiff's sureties fail to justify. |
| 9. Sheriff's return. | |

1. "If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff on demand of him or his agent, shall indemnify the sheriff against such claim, by an undertaking, executed by two sufficient sureties, accompanied by their affidavit, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, and freeholders and householders of the county. And no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity."¹

2. This section applies only when the property is taken by the sheriff in the proper discharge of his duty; as where

¹ Code, § 216.

the property of a stranger is taken from the possession of the defendant or his agent, in which case the owner is limited to the remedy given above. But, if the property be not that described in the affidavit, or if the sheriff has taken it from the possession of any person other than the defendant, or his agent, the true owner may maintain an action of trespass, trover, or replevin, against the sheriff for recovery of the property. In such case he is not bound to make any affidavit as provided in this section.¹

3. But where the goods were taken by the sheriff from the possession of the defendant or his agent, even though they were the goods of a stranger, the remedy prescribed by the above section is the only way in which such stranger can assert his claim. He cannot replevy the property as against the sheriff or the plaintiff.²

4. If the goods be taken from the possession of any other person than the defendant, the burden is on the sheriff to establish the fact, that an agency exists, or he will be liable.³ But he is protected by the process in taking from the defendant the specific goods described in the affidavit, even though such goods belong to a third person. In such case the owner must resort to the remedy given above, and may have an action for damages against the issuer or instigator of such process.⁴

5. Where a third person makes claim to property as provided above, his affidavit must be full and specific; and must show clearly the existence and paramount nature of the title so claimed. If such third person claim to own the property, he should state the facts of the purchase, as to time when, price, and the person from whom. If he claim only a right of possession, he should set forth the ground of that right, in detail. (See form No. 48).

¹ King v. Orser, 4 Duer, 431.

² Edgerton v. Ross, 6 Abb., 189;
King v. Orser, *supra*.

³ King v. Orser, 4 Duer, 431.

⁴ Foster v. Pettibone, 20 Barb., 350.

6. On receiving such affidavit, the sheriff should at once notify the plaintiff of the fact of such claim, and demand a bond of indemnity from the plaintiff to protect him against such claim. Should the plaintiff neglect or refuse to furnish the proper bond, the sheriff should return the property to the defendant, or person from whom it was taken.¹ (See form No. 50).

7. But if the plaintiff still desires the possession of the property, in hostility to the claim of such third person, he must, without delay, execute and deliver to the sheriff, a bond of indemnity as provided by the above section. Such bond must be accompanied by the affidavit required in such section, but it need not be approved by the sheriff, nor need the sureties justify; but it should be proved or acknowledged in like manner as deeds of real estate.² The sheriff should allow the plaintiff a reasonable time to furnish the undertaking, and may retain the property for that purpose. (See form No. 51).

8. "The sheriff shall file the notice and affidavit, with his proceedings thereon with the clerk of the court in which the action is pending within twenty days after taking the property mentioned therein."³

9. The sheriff's return should show truly and fully what has been done, where, when and from whom the property was taken, in what manner and upon whom the copies were served, and, also, what has been done with, or what proceedings have been had as to the property, since it was taken by the sheriff. In making such return the sheriff is acting ministerially and is liable for any error therein.⁴

10. Where the proceedings of the plaintiff are irregular, or where the property has been improperly taken out of

¹ Edgerton v. Ross, 6 Abb., 189.

² Rule 6.

³ Code, § 217.

⁴ Houghton v. Swarthout, 1 Denio, 589; Wickware v. Bryan, 11 Wend., 545.

the hands of the person in possession, such person may move to set aside the proceedings, and for a return of the property. Thus where the plaintiff alleged in his affidavit that the property was not taken for a tax, assessment or fine pursuant to a statute, a motion to set aside the proceedings was granted upon its appearing, by affidavits on the part of the defendant, that the defendant was a deputy collector of internal revenues for the United States, and that the property was taken for an assessment or tax under the Internal Revenue act.¹ So, where the proceedings were improperly instituted, they will be set aside ; as where the only remedy of the plaintiff is by proceeding under section 216 of the Code, and he has commenced proceedings for the claim and delivery of the property.² So, where plaintiff had the defendant arrested in the action for removing or concealing the property, and afterwards instituted proceedings to get possession of the property, the court set aside the latter proceedings, and directed a return of the property.³ (See form No. 52).

11. But on motion to set aside the proceedings for defects in the affidavit, the court may, in a proper case, allow an amendment; and it may also allow additional affidavits to be read in support of the original one.⁴ If, however, the defendant has put in a general appearance in the action, or if he has procured a return to him of the property, he will be held to have waived all irregularities in the plaintiff's affidavit.⁵

12. The plaintiff cannot discontinue the action without providing for a return of the property to the defendant, as well as for the payment of costs. If the plaintiff neglect to proceed before issue, the defendant may, under section

¹ O'Reilly v. Good, 42 Barb., 521; cases cited; Clickman v. Clickman, 18 Abb., 106. 3 How., 365.

² King v. Orser, 4 Duer, 431.

³ Chappel v. Skinner, 6 How., 338.

⁴ Depew v. Leal, 2 Abb., 136, and

⁵ Id.; Hyde v. Patterson, 1 Abb., 248; Wis. Ins. Co. v. Hobb, 22 How., 49.

274 of the Code, have judgment for a dismissal of the complaint, with costs, and for a return of the property; or if he neglects to proceed after issue, the defendant may notice the cause for trial under section 258, and have a dismissal, verdict, or judgment as the case may require. An order that the complaint be dismissed, unless the plaintiff bring the cause to trial within a specified time, is improper in such a case.¹

13. An action for the recovery of specific personal property wrongfully detained, against a sole defendant, wholly abates if the defendant dies before verdict or judgment; and the court has no power in such case to order the action to be continued against the personal representatives of the defendant.²

14. It is provided, as we have already seen, that the defendant in this action may be arrested and held to bail, where the property for the recovery of which the action is brought, has been removed, concealed, or disposed of so that it cannot be found or taken by the sheriff, and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.³

15. The property must not only be concealed but successfully concealed; or if disposed of, must be in such hands that the sheriff cannot lawfully take it; ⁴ and it must have been concealed or disposed of with a fraudulent intent. So that when the property has been disposed of in the ordinary course of business, no arrest can be made.⁵ The plaintiff cannot have the defendant arrested and have a delivery of the property also. So, that if the property be found after the arrest, the plaintiff cannot have possession thereof.⁶

¹ Wilson v. Wheeler, 6 How., 49;

¹ Code R. (N. S.), 402.

² Hopkins v. Adams, 6 Duer, 685; 258.

⁵ Abb., 351.

³ Code, § 179, sub 3.

⁴ Mulvey v. Davison, 8 How., 112.

⁵ Reimer v. Nagel, 1 E. D. Smith,

⁶ Chappel v. Skinner, 6 How. 338.

16. Where the defendant has been arrested, he will not be discharged either because the plaintiff's sureties have failed to justify; nor because it appeared that such sureties were insufficient or insolvent. If the security is insufficient, he must look to the sheriff.¹ A female is not liable to arrest in an action of this kind, the third subdivision of section 179 of the Code being governed by the latter part of subdivision five.²

¹ *Manley v. Patterson*, 3 Code R., 89.

² See ante, chap. I, sec. VI, pl. 12.

CHAPTER III.

INJUNCTIONS.

SECTION I. Nature and purposes, and by whom granted.

II. When granted. General principles.

III. Trespass and waste.

IV. Easements and servitudes.

V. Nuisances.

VI. Covenants relating to real property.

VII. Roads, rail roads and bridges.

VIII. Taxes and assessments.

IX. Contracts.

X. Patents, copyrights, trade marks and signs.

XI. Negotiable instruments, deeds and stocks.

XII. Restraining suits and judgments.

XIII. In creditor's suits.

XIV. Corporations.

XV. Partners, public officers and other parties.

XVI. Restraining acts pending litigation.

XVII. When granted; the affidavit.

XVIII. Order to show cause; after answer; against corporations.

XIX. Security.

XX. Form, service of, and obedience due injunction.

XXI. Dissolving and modifying.

XXII. Assessment of damages.

SECTION I.

NATURE AND PURPOSES, AND BY WHOM GRANTED.

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| 1. § 218 of the Code. | 9. Order, by whom granted. |
| 2. Definition and nature. | 10. Against corporations and state officers. |
| 3. In what cases applied. | 11. Only issues against parties. |
| 4. Provisional or perpetual. | 12. And agents and servants. |
| 5. Preliminary or temporary. | 13. Effect of including third persons. |
| 6. A preventive remedy. | 14. Granted only to the plaintiff. |
| 7. The writ of injunction. | 15. Never retroactive. |
| 8. <i>Ex parte</i> application — notice. | |

1. "The writ of injunction as a provisional remedy, is abolished, and an injunction by order is substituted therefor. The order may be made by the court in which the action is brought, or by a judge thereof, or by a county judge, in the cases provided in the next section; and when made by a judge, may be enforced as the order of the court."¹ This section has remained unaltered since its passage in 1848.

2. An injunction is a prohibitory writ or order restraining a person from doing, or suffering to be done, any act which appears to be against equity and conscience. It has always been the most efficient instrument for carrying into effect the equitable jurisdiction of a court of chancery, operating with great and salutary force in preventing many public and private injuries, for which no other equally effective and comprehensive remedy exists; and although the writ of injunction, as used in chancery proceedings, is abolished by the Code, as a provisional remedy, and an injunction by order substituted therefor, yet the nature of this remedy remains substantially the same.

¹ Code, § 218.

Nor has it been materially affected by the attempt in the Code, to sweep away all distinctions between legal and equitable remedies, and to reduce all actions to one homogeneous form; for the continuance of equity, as a distinct branch of jurisprudence, and the application of equitable as well as legal remedies has been repeatedly recognized by the courts, under the Code.

3. Among the various cases in which this remedy may be applied, are the following: To stay proceedings in courts of law, courts of admiralty, or in some other court of equity; to restrain the indorsement or negotiation of notes and bills of exchange, the sale of lands, the sailing of ships, the transfer of stock or the alienation of a specific chattel; to prevent the wasting of assets or other property pending litigation; to restrain a trustee from assigning the legal estate, from setting up a term of years, or assignees from making a dividend; to restrain the commission of every species of waste to houses, mines, timber, or any other part of an inheritance; to suppress the continuance of public or private nuisance; to prevent the infringement of patents, the publication of private letters, and the violation of copyright, either by publication or theatrical representation, and to check the progress of vexatious litigation. These, however, are far from being all the instances in which this species of equitable interposition is obtained, for in that almost illimitable variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or continuance of some act of the defendant, a court of equity administers it by means of an injunction.¹

4. Injunctions are either *provisional* or *perpetual*; the former issuing during the pendency of the action, either

¹ See 1 Waterman's Eden, 10.

at its commencement or at any time afterwards before judgment, while the latter are awarded by the decree or judgment after a final hearing upon the merits.¹ It is to provisional injunctions only that this chapter applies. The rules and practice governing perpetual injunctions are the same as before the Code.²

5. Provisional injunctions are either preliminary, or temporary; but the distinction does not seem to be of any practical importance, the difference consisting mainly in this, that while a preliminary general injunction will not be granted without notice, after the defendant has appeared, or at least after he shall have answered; yet, in order to prevent great or irreparable injury, an order to show cause will be granted, with a temporary injunction, restraining the defendant in the mean time.³

6. The object of the *perpetual* injunction may be either preventive and protective, or restrictive and mandatory. It may not only command a party to refrain from doing an act, but may also order him, directly or indirectly to perform some act;⁴ but the *provisional* injunction is wholly a *preventive remedy*. Its office is to restrain the acts of the defendant in the suit, and not to compel him to undo what he has already done, or to restore any thing further than results from such restraint.⁵

7. The *writ* of injunction is abolished only as a provisional remedy. This chapter of the Code has no application to final or perpetual injunctions, and they are consequently governed by the former practice, except as modified by other parts of the Code. But inasmuch as the final or perpetual injunction is always granted by decree or

¹ 1 Barb. Ch. Pr. 608; Wil. Eq. Pr. 341.

² N. Y. Life Ins. Co. v. Supervisors of N. Y., 4 Duer, 200; Reubens v. Joel, 13 N. Y. R., 488.

³ Code, §§ 221, 223; Van Santvoort Eq. Pr., 338.

⁴ Howe v. Searing, 19 How., 14; 1 Barb. Ch. Pr., 607.

⁵ Ward v. Kelsey, 14 Abb., 106; Hilliard on Injunctions, p. 6.

judgment, and the *writ* was never needed, save as a provisional remedy, it follows, that the *writ* of injunction is, in effect, abolished.

8. The application for an injunction at the commencement of the suit is, of course, *ex parte*, and is frequently made under such circumstances as demand the immediate interference of the court. But although the court has power to grant the order at once and without notice, yet, in cases of importance or doubt, it usually provides for giving the defendant notice by means of an order to show cause why such injunction should not be allowed, restraining the defendant in the mean time and until the hearing of the motion.¹ After the defendant has answered in the action, an injunction can only be allowed after due notice;² and the rule was the same before the Code, except that the defendant was entitled to notice after an appearance, instead of after answer.³ (See form No. 54).

9. In the ordinary cases, the order may be made either by the court, in which the action is brought, or by a judge thereof, or by a county judge. When granted by the court, it is generally by the court at special term,⁴ although it may be granted by the supreme court at general term.⁵ When granted by a judge of the court in which the action is brought, it may be made in any part of the state, and may be enforced, in all things, as an order of the court. When granted by a county judge, it must be by the judge of the county where the action is triable, that is, where the place of trial is laid in the complaint, or by the county judge of the county in which the attorney for the moving party resides; and in any case, it can only be granted *ex*

¹ Code, § 223; Van Sant., Eq. Pr., 120; *Androvette v. Bowne*, 15 How., 75.

² Code, § 221.

³ 1 Barb. Ch. Pr., 610.

⁴ Rule 40.

⁵ *Drake v. Hud. Riv. R. R. Co.*, 2 Code R., 67; and see *Town of Guilford v. Cornell*, 4 Abb., 220; 18 Barb., 615; 3 Kernan, 148.

parte, as a county judge has no power to hear a motion on notice, in an action pending in the supreme court.¹ A judge related to either party by affinity, within the degree which would exclude him as a juror, cannot grant an injunction in an action between the parties, any more than he can do any other judicial act in a case where he is related.²

10. But an injunction to suspend the general and ordinary business of a corporation can only be granted by the court or a judge thereof;³ and an injunction to restrain a board of state officers, or persons employed by them, from executing any duty devolved upon them by law, can be granted only by a general term of the supreme court, sitting in the district in which the board of officers is located, or where such duty is required to be performed.⁴

11. It is a general rule, that injunctions can not be issued against persons who are not parties to the suit.⁵ But the rule is subject to some exceptions. Thus, the court has power to grant an injunction against the servants and agents of the party restrained, or to punish a violation of an injunction, on the part of such servants or agents, where knowledge of the injunction is brought home to them.⁶ So where ever the court has power to make an order, in consequence of having jurisdiction over the subject matter of the suit or proceeding, and which a person is bound to obey in consequence of his being actually or constructively a party to the suit, it may enforce obedience to such order by the process of injunction.⁷ Accordingly, if there has been a decree for the administra-

¹ Code, § 401, sub 3, 403; *Meritt v. Slocum*, 3 How., 309; *Rogers v. McElhone*, 12 Abb., 292; 20 How., 441.

² *N. Y. & N. Haven R. R. v. Schuyler*, 28 How., 187.

³ Code, § 224.

⁴ Laws 1851, chap. 488, p. 920.

⁵ *Fellows v. Fellows*, 4 John. Ch. R. 25; *Watson v. Fuller*, 9 How., 425; see *Edmonstone v. McLoud*, 19 Barb., 356.

⁶ Vide *People v. Sturtevant*, 5 Seld., 263; *aff. same case*, 1 Duer, 512.

⁷ *Matter of Hemiup*, 2 Paige, 316.

tion of assets, the court will restrain a creditor who is not a party in the suit, from proceeding, at law, against the testator's or intestate's estate, for his own individual debt. This it does, because it considers the decree it has made as a proceeding *in rem* in the nature of a judgment for all the creditors, and having taken the fund into its own hands, it will administer it equitably and not permit executors to be pursued at law. And this power is not confined to the executor or administrator only, but the injunction will also be granted on the application of the heir, or of another creditor, or of a common legatee, or even, as it seems, of a residuary legatee. There is no instance, however, in which a creditor at law has ever been stopped, unless there was a decree, under which he could come in; for until there is such a decree, the creditor ought not to be deprived of a prior judgment. But when the decree has been made, from that moment it must be preferred if it precedes the judgment in point of time, and all the creditors must be paid according to their priority as they stand.¹

12. To make a person, who is not a party to the action or named in the injunction order, liable for disobeying such injunction, on the sole ground that he is an agent or servant, the person should bear such a relation to the defendant as will enable the latter to control the action of the person sought to be charged, in regard to the subject matter as to which the injunction issues; this is but reasonable. The remedy by injunction is extraordinary, and should only be resorted to when there is a clear right, as there is much greater reason to apprehend that irreparable injury will be produced by its too frequent use, rather than from the too frequent denial of this remedy.² Lessees in good faith of a water power, who are not

¹ 1 Barb. Ch. Pr., 621, and cases cited.

² Batterman v. Finn, 32 How., 501.

made parties to the action, are not liable in damages for disobeying an injunction against their lessor, to restrain him, his servants and agents, from an injurious flow of water upon the plaintiff's premises, upon the ground that they act as the servants and agents of the defendant, the lessor.¹

13. Where an injunction order includes persons who are neither parties, nor servants of parties, to the proceeding in which it issues, it is nevertheless valid as to parties to the proceeding;² and may even operate as a sufficient notice to such third persons as are included.³

14. An injunction is usually granted only on behalf of the plaintiff in the action; but if the complaint shall show upon its face that the defendant is entitled to that remedy, or if the defendant shows himself entitled to affirmative relief, it may be granted on behalf of such defendant. The usual course, however, is for the defendant to commence a cross action, and to obtain his injunction in that suit.⁴

15. An injunction is never retroactive in its effect, nor does it operate upon proceedings subsequent to its allowance, but before its service.⁵ But actual knowledge or information of an injunction binds a party to obedience until the plaintiff has had a reasonable time to serve such injunction.⁶

¹ *Batterman v. Finn*, 32 How., 501.

² *Tradesman's Bank v. Merritt*, 1 Paige, 302.

³ *Sage v. Quay, Clark*, 348.

⁴ *Thorsby v. Mills*, 1 Code R., 83; *Waller v. Harris*, 7 Paige, 173.

⁶ *People v. Albany & N. R. R. Co.*,

12 Abb., 171; 20 How., 358; *Ramsdell v. Craighill*, 9 Ham., 197.

⁵ *People v. Sturtevant*, 9 N. Y. R., 278; *Mayor of N. Y. v. Conover*, 5 Abb., 257; *Hull v. Thomas*, 3 Edw. Ch. R., 238.

SECTION II.

WHEN GRANTED. GENERAL PRINCIPLES.

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| <ol style="list-style-type: none"> 1. § 219 of the Code. 2. Power of the court not abridged. 3. Three classes of injunctions. 4. Discretion of the court in granting. 5. Should be granted with great caution. 6. The right must be clear. 7. Exceptions to the rule. 8. Right to relief must appear in the complaint. | <ol style="list-style-type: none"> 9. Must be specially prayed for. 10. Except in some cases. 11. Injury must be inevitable and continuing. 12. No remedy at law. 13. Nor by special proceedings. 14. Plaintiff must be free from fault. 15. Judge to decide motion for order within twenty days. |
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1. "1. Where it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or, 2d. When, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done, in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. 3. And where, during the pendency of an action, it shall appear by affidavit that the defendant threatens, or is about to remove, or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition."¹ The first clause of this section was slightly changed in 1849, and the third clause was then added, since which time it has been unchanged.²

¹Code, § 219.

²In the first clause in 1848, the adjectives "great and irreparable" preceded "injury."

2. This section bears upon its face unmistakable evidence of a discrimination by the legislature in its enactment between actions at law and suits in equity. The first and second branches of the section plainly apply to the latter class of actions exclusively, while the third is clearly intended to apply to actions at law, and is, therefore, an obvious enlargement of the power of the court to enjoin. The first two clauses are, in substance, a mere embodiment of the established equity principles as they existed before the Code, and cannot be construed to create new rights of action, or to give new remedies; nor are they in any sense an abridgment of the former jurisdiction of the court. The provisional injunction allowed by this section may be granted in every case where a temporary injunction would have been proper under the former practice.¹

3. The injunctions obtainable under this section may be divided into three general classes, which will, as far as is practicable, be treated of in the following order: 1. Injunctions to restrain, pending the suit, some act, against which a perpetual injunction is sought in the action itself. 2. Injunctions to restrain the defendant in an action from doing some act in violation of the plaintiff's rights, respecting the subject of such action, and tending to make the judgment ineffectual. 3. Injunctions to restrain the defendant from disposing of his property to defraud his creditors.

4. The language of the section is *permissive* and not imperative, and the granting or refusing of a preliminary injunction rests in the sound discretion of the court, to be exercised according to the circumstances of each case. It should not be granted on light grounds nor in doubtful cases. Where the right is not clear, or the danger great, or the mischief irreparable, it should be withheld until

¹ Reubens v. Joel, 13 N. Y. R. 488; Merrill v. Thompson, 3 E. D. Smith, 284.

the rights of the parties are ascertained and settled upon a final hearing.¹

5. There are many cases in which the plaintiff may be entitled to a perpetual injunction on the hearing, when it would be manifestly improper to grant an injunction *in limine*,² even where the plaintiff brings himself within the strict letter of the section. Some regard should be had to the nature and extent of the injury which the plaintiff would suffer if withheld; and also as to its consequences to the defendant, if granted;³ and, in no case, should the remedy be disproportionate to the injury apprehended.⁴

6. As a general rule, clear legal, or equitable right, free from reasonable doubt, must be satisfactorily shown to authorize a preliminary injunction.⁵ It is an appeal to the extraordinary power of the court, and the plaintiff is bound to make out a case showing a clear necessity for its exercise;⁶ and especially is this the case, where it appears that the defendant is responsible to answer any claim of the plaintiff for damages.⁷ It is the duty of the court rather to protect acknowledged rights than to establish new and doubtful ones.

7. But the rule is not without qualification, for when the acts of the defendant in relation to the subject matter of the suit may be attended with great and irreparable injury, or when the defendant is irresponsible, an injunction may be so far granted as to restrain injury to the subject

¹ *Bruce v. Del. & Hud. Canal Co.*, 19 Barb., 371; *Gamee v. Odell*, 13 Abb., 264; *Sixth Av. R. R. Co. v. Kerr*, 28 How., 382; *Redfield v. Middleton*, 7 Bosw., 649; *Roberts v. Matthews*, 18 Abb., 199.

² *N. Y. Printing Estab. v. Fitch*, 1 Paige, 98.

³ *Bruce v. Del. & Hud. Canal Co.*, and cases cited above.

⁴ *Gallatin v. Oriental Bank*, 16 How., 253.

⁵ *City of N. Y. v. Mapes*, 6 John. Ch. R., 46; *Olmsted v. Loomis*, 6 Barb., 152.

⁶ *Auburn, etc., v. Douglass*, 12 Barb., 555; *Dubois v. Budding*, 15 Abb., 445.

⁷ *Stevenson v. Fayerweather*, 21 How., 449; *Powers v. Algiers*, 13 Abb., 284.

matter in question, even though the plaintiff's right is not clear.¹ Thus, the commission of waste of every kind, such as the cutting of timber, pulling down of houses, working of mines, and the like, is now a frequent ground for exercising the jurisdiction of a court of equity, even against persons acting under a claim of right, by restraining such waste until the rights of the parties can be determined; and the interference by injunction in these cases is placed upon the ground of preventing irreparable mischief, and the destruction of the substance of the inheritance.² So, where the defendant attempted to build a party-wall on the land of the plaintiff, under a contract or agreement which was in dispute, and it appeared that such act of the defendant would work irreparable injury to the plaintiff, the court granted an injunction, until the rights of the parties could be settled.³

8. And not only must a clear *prima facie* right to the relief sought, be shown, but if such relief is sought under the first clause of the section, such right must appear upon the face of the complaint itself, by all necessary and proper averments; and it must likewise appear therein that the plaintiff is entitled to a final injunction as against the defendant sought to be enjoined; and such injunction must be prayed for in due form.⁴

9. A preliminary injunction will not ordinarily be granted under a prayer for general relief, unless the necessity for it grows out of the proceedings, and not from the original situation of the parties.⁵

10. This rule, though true in general, is not in all cases

¹ *Spear v. Cutter*, 5 Barb., 486; 4 How., 175; *Mallory v. Norton*, 21 Barb., 424; *Brinton v. Wood*, 19 How., 162; *Rector of Church of Holy Innocents v. Keech*, 5 Bosw., 691.

² *Livingston v. Livingston*, 6 John. Ch., 497, and cases cited; *Spear v. Cutter*, *supra*.

³ *Rector, etc., of the Church of the Holy Innocents v. Keech*, 5 Bosw., 691.

⁴ *Corning v. Troy Iron & Nail Fact.*, 6 How., 89; *Hulce v. Thompson*, 8 How., 475; *Ward v. Dewey*, 7 How., 17; *Smith v. Reno*, 6 How., 124; *Chemical Bank v. Mayor*, 12 How., 476.

⁵ 1 Barb. Ch. Pr., 615.

rigorously applied. Where it appears by the complaint that the plaintiff is entitled to the principal relief demanded, and it also appears that the defendant threatens to do an act which, if done during the litigation, would manifestly operate injuriously upon the plaintiff's rights; and the injury is both substantial and inevitable, the defendant may be restrained, although such restraint may form no part of the specific relief prayed in the action.¹ Thus, an injunction is sometimes granted in a creditor's bill where a perpetual injunction is no part of the final decree; or in a mortgage foreclosure to restrain the commission of waste pending the litigation, where the mortgaged premises are an inadequate security. So, an injunction may be granted to prevent the husband from wasting his estate, to cut off the wife's alimony pending a divorce suit, although such injunction is no part of the final relief prayed for.²

11. From the nature of an injunction as a preventive remedy it necessarily results, that, in order to justify its application the injury in question must be likely to occur without it, and it must also appear that the mischief apprehended is not only real and substantial, but *continuing*; for no matter how clear the original right may be, if the trespass be complete and perfect, the court will not interfere.³ Nor will the court, as a general rule, restrain the completion of works from which injury is merely possible, but is not shown to be certain and inevitable.⁴

12. Where a party has a *remedy at law*, he cannot come into equity, unless, from circumstances not within his control, he could not avail himself of his legal remedy; or where the plaintiff's rights cannot be protected or en-

¹ Vermilyea v. Vermilyea, 14 How., 470.

² Rose v. Rose, 11 Paige, 163; Vermilyea v. Vermilyea, 14 How., 470.

³ Moreland v. Richardson, 22 Beav.,

604; Perkins v. Warren, 6 How., 348; Maripose Co. v. Garrison, 26 How., 448.

⁴ Com. of Highways v. Albany N. R. R. Co., 8 How., 70; Harrison v. Newton, 9 Leg. Obs., 347.

forced at law, except by numerous and expensive suits, equity may interpose to give the party redress by injunction or specific performance, but in such cases, generally, the plaintiff must first establish his right at law before a court of equity will interfere.¹ The general rule, or principle, undoubtedly, is that equity will not enjoin the commission of acts injurious to the plaintiff, if compensation can be recovered at law;² nor will it restrain by injunction the commission of an ordinary trespass or tort.³ The threatened injury or grievance must be irreparable, or such as cannot be compensated in damages at law.⁴ Thus, a purchaser of land, who has a full and complete remedy at law on the covenants in his deed, cannot have an injunction against his vendor to restrain him from collecting the purchase money;⁵ though a person who does not reside, and has no property in the state, may be restrained from collecting a note given for land to which he had no title, notwithstanding the remedy at law on a covenant of warranty.⁶

13. Nor is the issuing of an injunction proper where an adequate remedy is given to the plaintiff by special proceedings, or by *certiorari*, *quo warranto*, or other analogous remedy;⁷ nor where it is not essential to secure the party's rights, and the object can be effected by filing a notice of *lis pendens*.⁸

14. An application to a court of equity for the exercise of its prohibitory powers, must come recommended by the dictates of conscience, and be sanctioned by the clearest

¹ Penn. Coal Co. v. Del. & Hud. Canal Co., 31 N. Y. R., 91.

² Barnes v. McAllister, 18 How., 534; Balcom v. Julien, 22 How., 348.

³ Sixth Av. R. R. Co. v. Kerr, 28 How., 382, and cases cited.

⁴ Sixth Av. R. R. Co. v. Kerr, supra.

⁵ Wilkins v. Hogue, 2 Jones Eq., 479.

⁶ Green v. Campbell, 2 Jones Eq., 446.

⁷ Kelsey v. King, 32 Barb., 410; Hyatt v. Bates, 35 Barb., 308; Hartt v. Harvey, 32 Barb., 55; Handley v. Mayor of N. Y., 16 How., 228.

⁸ Mills v. Mills, 21 How., 437; Stevenson v. Fayerweather, 21 How., 449.

principles of justice. It is the golden rule of the law, that "he who seeks equity must do equity." So, he who seeks an injunction must be himself free from wrong or fault.¹

15. It is the duty of the judge before whom a motion for an injunction order is made, to render and make known his decision of such motion within twenty days after the day on which it is submitted to him for his decision.²

¹Clayton v. Yarrington, 33 Barb., 144.

²Code, § 401, sub 8, amend. of 1867.

SECTION III.

TRESPASS AND WASTE.

- | | |
|---|---|
| <ul style="list-style-type: none"> 1. Trespass. 2. Strong case must be presented. 3. When equity will interfere. 4. Plaintiff's right must be clear. 5. Injury must be certain and inevitable. 6. <i>Waste</i>. 7. When defendant is in possession. 8. Action of waste abolished. | <ul style="list-style-type: none"> 9. Who may have injunction against waste. 10. Against whom injunction granted. 11. Subjects of <i>waste</i>. 12. Waste in timber. 13. What acts tenants may do. 14. Not waste to remove fixtures not attached to freehold. |
|---|---|

1. An injunction will not be granted to restrain the commission of an ordinary tort or trespass; but the plaintiff will be left to his remedy at law.¹ There are, however, cases of trespass where an injunction will be awarded, as where the trespasser is insolvent, or the injury irreparable and destructive to the very nature and substance of the plaintiff's estate. There must be something particular or special in the case, for which, either from difficulty of proof, or some other cause, the party cannot obtain adequate satisfaction in the ordinary course of law.²

2. The ancient doctrine of the courts was not to interfere by injunction in any case of trespass, but to leave the party to his legal remedy; but the modern practice is more liberal; nevertheless, it is essential that a strong case of destruction or irreparable mischief be presented.³

3. While, for a mere naked trespass, when the remedy at law is full and adequate, equity will not interpose; yet,

¹ *Sixth Av. R. R. Co. v. Kerr*, 28 How., 382; *Marshall v. Peters*, 12 How., 218.

² *Livingston v. Livingston* 6 John. Ch., 497; *N. Y. Print. Es. v. Fitch*, 1

Paige, 97; *Jerome v. Ross*, 7 John. Ch., 315; *Hart v. Mayor of Albany*, 3 Paige, 213; *Livingston v. Hud. R. Co.*, 3 Code R., 143.

³ *Livingston v. Livingston*, *supra*.

for the purposes of quieting a possession, or preventing a multiplicity of actions, or where the value of the inheritance is in jeopardy, or irreparable mischief is threatened in relation either to mines, quarries or woodland, the court will interfere by injunction even against a person acting under a claim of right. And the injury may be irreparable, either from the nature of the injury itself or from the want of responsibility in the person committing it.¹

4. When the right of a party is doubtful, the court will seldom grant an injunction to prevent an illegal interference with the same, until the right is established at law. To warrant an injunction to prevent a mere trespass, the party invoking the aid of the court must have been in the previous undisturbed enjoyment of the property, under claim of right, or relief at law must be unattainable, from the irresponsibility of the defendant or otherwise.² Where the defendant was accustomed to land his steam boat at the dock of the plaintiff, as no serious damages were to be apprehended from the continuance of the act, the court refused to grant an injunction *in limine*.³ So, for cutting and carrying away timber, an injunction will not be granted.⁴ So, where the plaintiff charged that one of the defendants had assumed to convey plaintiff's land to the other, and sought to restrain them from committing trespass thereon, the application was denied.⁵ But where the plaintiff's title was disputed on the sole ground that he had dedicated the land to the public use, and, under such claim of right, the defendant had repeatedly thrown down fences erected by the plaintiff; and traveled over the

¹ Willard's Eq. Jur., 382, and cases there cited.

² Hart v. Mayor of Albany, 3 Paige, 214; Storm v. Mann, 4 John. Ch., 21; Partridge v. Menck, 2 Barb. Ch., 101; Van Bergen v. Van Bergen, 3 John. Ch., 282.

³ N. Y. Printing, etc., v. Fitch, 1 Paige 97.

⁴ Stevens v. Beekman, 1 John. Ch., 318; Johnson v. White, 11 Barb., 194.

⁵ Van Rennselaer v. Griswold, 4 Ch. Sent., 1; 3 N. Y. Leg. Obs., 94.

plaintiff's land, an injunction was granted.¹ So, in a case of sufficient importance, an injunction will be awarded to restrain the defendant from cutting trees standing on the line between the property of the plaintiff and the defendant.²

5. An injunction to restrain an apprehended trespass is never allowed, except under special circumstances; the injury must be shown to be certain and inevitable without it.³ Nor will the court interfere where the trespass is complete and perfect.⁴

6. Waste is a familiar ground for injunction, and is perhaps an injury better entitled to be termed irremediable than any other.⁵ Yet, a court of equity will generally interfere, only when the plaintiff has no remedy at law, or a discovery is necessary, or there is some other ground for equitable interference.⁶

7. It was formerly held that an injunction to stay waste would never be granted against a defendant in possession, and claiming by title adverse to that of the plaintiff;⁷ but in latter cases an injunction is allowed to restrain injury to land, even where the defendant is in possession, and the title in dispute, if the waste or trespass will be attended with irreparable mischief, or if, from the irresponsibility of the defendant or otherwise, the plaintiff can obtain no relief at law.⁸

8. The action of waste is abolished by the Code, but the wrongs remediable by that action are, like other wrongs, subjects of action, in which there may be judg-

¹ *Carpenter v. Gwynn*, 35 Barb., 395.

² *Relyea v. Beaver*, 34 Barb., 547.

³ *Mayor of N. Y. v. Conover*, 5 Abb., 171; *Com. of Highways v. Albany N. R. Co.*, 8 How., 70.

⁴ *Perkins v. Warren*, 6 How., 348; *Mariposa Co. v. Garrison*, 26 How., 448.

⁵ *Walker v. Sherman*, 20 Wend., 638.

⁶ *Winship v. Pitts*, 3 Paige, 259.

⁷ *Lansing v. North River Steam Boat Co.*, 7 John. Ch., 164; *Storm v. Mann*, 4 John. Ch., 21.

⁸ *Spear v. Cutter*, 5 Barb., 486; 2 Code, 100; *Cornelius v. Post*, 1 Stockt., 196.

ment for damages, forfeiture of the estate of the party offending, and eviction from the premises.¹ There are, also, statutory remedies for staying waste, pending an action by an order of the same court; providing that in all cases after the commencement of an action for the recovery of land, or for the recovery of the possession of land, if the defendant shall commit waste, the court may enjoin the commission of any further wastes, and enforce the order as a court of equity enforces an injunction.²

9. Any one seized in remainder or reversion may have an injunction to restrain waste or injury to the inheritance, notwithstanding any intervening estate for life or years.³ So, an intermediate tenant for life may enjoin the tenant for years against waste;⁴ so a second tenant for life may restrain the first tenant for life.⁵ So, any remainder man, who is injured, may maintain a bill in equity against waste; though an action at law can be maintained only by the owner of the first estate of inheritance.⁶ A landlord may have an injunction, unless restrained by an express agreement; and, even when the lease contains the clause *without impeachment of waste*, which takes away the remedy at law, equity will, in many cases, restrain waste; as where this power is exercised in an unreasonable manner and against conscience.⁷ So, a ground landlord may enjoin an under lessee.⁸ An injunction to stay waste between tenants in common will be granted in special cases, as where the defendant is insolvent, or where the waste is destructive to the estate, and not within the usual and legitimate exercise of its enjoyment; or where one tenant in common occupies as tenant under

¹ Code, § 450.

² 1 R. S., 333.

³ 1 R. S., 750, § 8; see Van Deusen v. Young, 29 N. Y. R., 9.

⁴ Roswell's case, 1 Rolle Abr., 377.

⁵ Perot v. Perot, 3 Atkins, 94.

⁶ Dennett v. Dennett, 43 N. H., 508.

⁷ Kane v. Vanderburgh, 1 John. Ch. R., 11; Aston v. Aston, 1 Ves., 264.

⁸ Farrant v. Lowell, 3 Atk., 723.

another.¹ So, a mortgagee, either legal or equitable, may have an injunction to stay waste, especially where the security is insufficient.² So, a purchaser of part of a mortgaged estate may have an injunction, against waste by an assignee for benefit of creditors, of the mortgagor of another part; standing in the light of a surety for the mortgaged debt.³ So, a bill to restrain waste may be filed in behalf of an infant *en ventre sa mere*.⁴

10. By the revised statutes, guardians, tenants by the curtesy, or in dower, tenants for a term of years, or the assigns of any such tenant, are made liable to an action of waste.⁵ By the common law the assignee of the tenant by the curtesy could not be sued in waste for want of privity of estate.⁶ It is the duty of a tenant to treat the land in a husband like manner according to the custom of the country.⁷ So an injunction will be granted against a mortgagor in possession to stay waste where it is made to appear that the security is insufficient.⁸ An injunction to stay waste between tenants in common will be sustained where the defendant is insolvent; or where the waste is destructive of the estate and not within the usual and legitimate exercise of its enjoyment; or where one tenant in common occupies as tenant under another. Nor can a tenant for life or for years justify waste under a parol license, and the fact that the license was on condition that he should clear and seed the land on which he cut timber does not render the parol license admissible.⁹ Every tenant for life, unless restrained by cove-

¹ 2 R. S., 334, § 3; *Hawley v. Clowes*, 2 John. Ch. R., 122; Will. Eq., 380.

² *Brady v. Waldron*, 2 John. Ch., 148; *Ensign v. Colburn*, 11 Paige, 503.

³ *Johnson v. White*, 11 Barb., 194;

⁴ *Eden on Inj.*, 123, and cases cited.

⁵ 2 R. S., 334.

⁶ *Bates v. Schroeder*, 13 John. R., 263.

⁷ *Onslow v. —*, 16 Ves., 173; *Kane v. Vanderbergh*, 1 John. Ch., 11.

⁸ *Brady v. Waldron*, 2 John. Ch., 148; *Robinson v. Preswick*, 3 Edw., 246; *Ensign v. Colburn*, 11 Paige, 503.

⁹ *McGregor v. Brown*, 10 N. Y. R., 114.

nant, has a right to *house-bote, fire-bote, plough-bote* and *fence-bote*, that is, a right to take from the premises such wood as is necessary for fuel, for fences and for agricultural purposes.¹

11. The subjects of waste are mainly houses, gardens, orchards, lands, woods, or any other thing belonging to a tenement.² Thus, a tenant has no right to pull down valuable buildings, or to make improvements, or alterations which will materially and permanently change the nature of the property, so as to render it impossible for him to surrender the same premises substantially at the expiration of his term;³ but it is not waste to erect a new edifice if it can be done without destroying or materially injuring the buildings or other improvements already existing thereon.⁴

12. Waste in timber consists in cutting down, lopping, topping, or doing any act whereby it may be brought to decay;⁵ and the cutting of any sort of trees may be waste, whether they be timber, ornamental, or fruit trees, or whether they were planted for shade and ornament, or grew naturally in the position that renders them thus valuable to the owner.⁶ With regard to what shall be deemed ornamental, it seems to be settled that it is not the taste of the court, or of the tenant for life, that is to control, and it must therefore, in an application for an injunction in cases of this kind, be alleged that the trees cut down were not only ornamental, but also that they were planted or left standing for the purpose of ornament.⁷ It is not waste in a tenant for life to cut down timber for the purpose of making necessary repairs on the estate,

¹ Coke Litt., 416; *Harder v. Harder*, 26 Barb., 409.

² R. S., 334.

³ *Winship v. Pitts*, 3 Paige, 259; *Douglass v. Wiggins*, 1 John. Ch., 435.

⁴ *Ibid.*

⁵ Will. Eq., 370.

⁶ Coke Litt., 53.

⁷ *Marquis, etc., v. Sandys*, 6 Ves., 110; *Farnworth v. Ferris*, 6 Ves., 419; *Coffin v. Coffin*, Jac., 70.

and to sell such timber and purchase, with the proceeds, boards for such repairs, provided this be the most economical.¹ The general rule is that if the tenant, or his assigns cut down wood in such a manner as to injure the inheritance, it amounts to waste; though the principle is governed somewhat by the nature of the premises — for where a farm consisting mainly of woodland, is leased for agricultural purposes, the lessee has a right to fell the timber in order to fit the land for agricultural purposes, but he has no right to cut it for sale.² The court will ordinarily interfere to prevent future waste only, and not to control the disposition of that already cut, before an injunction was applied for, but where the defendant is insolvent and his intent fraudulent, he may be inhibited from removing that already cut.³

13. The general rule is that a tenant may not dig in quarries for stone, or in mines of metal or coal unless they were open at the time of the demise;⁴ though a tenant for life may open the earth in new places, in pursuit of an old vein where the mine has been opened before he came to the estate, yet he has no power to open new mines such as had not before been opened.⁵ Courts of equity, are, in general, reluctant in granting injunctions restraining mining operations, from the great expenditures required to renew operations after they have been suspended.⁶

14. While in most cases it would be waste for a tenant to remove the fixtures from the premises, yet where such fixtures are movable and not annexed to the freehold, an

¹ Loomis v. Wilbur, 5 Mason, 13.

⁴ Saunders' Case, 5 Coke, 22; 2

² Kidd v. Dennison, 6 Barb., 9; Rolles's Abr., 817.

People v. Davison, 4 Barb., 109; Cooper v. Stower, 9 John. R., 338.

⁵ Clavering v. Clavering, 2 P. Wms, 389; Whitfield v. Bewit, id., 240; Coates v. Cheever, 1 Cowen, 477.

³ Watson v. Hunter, 5 John. Ch., 169; Spear v. Cutter, 5 Barb., 486; Johnson v. White, 11 Barb., 194; Ensign v. Colburn, 11 Paige, 504.

⁶ Grey v. Northumberland, 17 Ves., 281.

injunction will not be granted ; as in case of a dove cote, and the removal of locks from the doors of the house, the chairs from the lawn, the statues, images and fences from the pleasure ground, or wardrobes, presses and closets from the house.¹ As to what are, and what are not fixtures, see ante page 157, *seq.*

¹ *Kimplin v. Eve*, 2 Ves. & B., 349.

SECTION IV.

EASEMENTS AND SERVITUDES.

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| <ol style="list-style-type: none"> 1. Servitude of light and air. 2. Party-walls. 3. What is — how repaired. 4. To what extent it may be altered by one owner. 5. When destroyed by fire — how rebuilt. 6. Support of soil from soil. 7. Support of soil and buildings thereon. 8. Effect of carelessness, etc., in digging. 9. Dedication. 10. Effect of dedication. 11. Subjects of dedication. 12. How dedication accepted by the public. 13. What acts amount to a dedication. 14. When dedication cannot be revoked. 15. Watercourse.* 16. When injunction in such cases granted. 17. Where the rights of the parties are fixed by contract. 18. General doctrine relating to water-course. 19. Right to the usufruct of water incident in the soil. 20. Concerning the rights of a riparian owner. 21. For what purposes and to what extent he may use the water. 22. Concerning the rights of mill owners. | <ol style="list-style-type: none"> 23. Equitable interference in regulating such rights. 24. The erection of a dam and machinery. 25. To what extent mill owner may use or detain water. 26. Cases of unreasonable detention. 27. Right to set back water. 28. Right to flow land by prescription. 29. The extent of the right to flow in such cases. 30. Right to divert water by prescription. 31. Priority of occupation. 32. When injunction granted without establishing right at law. 33. Mill owner cannot <i>divert</i> waters of a stream. 34. Concerning subterranean waters. 35. Law thereon in this state. 36. Cases where injunction was refused. 37. Subterranean streams having definite course. 38. Eaves drip. 39. Relating to upper and lower lands. 40. Littoral rights in innavigable streams. 41. Littoral rights in navigable streams. 42. Highways and roads. 43. Concerning pews. |
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1. The modern English doctrine as to the servitude of light and air, has not been followed by the courts of this state, and the law appears to be fully settled that no prescription of time — nothing, indeed, but express covenant — will prevent the owner of property from making an erection thereon which will darken and obscure the light of an adjoining building. The enjoyment of light and air is not an adverse user, nor, indeed, any user whatever, of another's property, and cannot, therefore, become the foundation of a presumption of right to continued use as

against an adjoining owner.¹ So far has this principle been extended as to permit a landlord, who owned land adjoining the demised premises, to build on such land, although he might thereby darken and obstruct the windows in the tenement demised.²

2. Among the urban servitudes of the civil law, was that of a right in one man to fix a beam or piece of timber, or stone, in his neighbor's wall. This servitude corresponds with that in the common law, known by the name of *party-walls*,³ and is founded upon the maxim that "equality of right requires equality of burden." By *party-walls* are understood walls between two estates, which are used for the common benefit of both, in the support of contiguous buildings standing thereon, by the agreement of the adjoining proprietors, and which have been used for such common support for twenty years; or, else, walls built by the owner of an estate between buildings erected thereon, for their mutual support. In the latter case a conveyance, by the owner, of either building conveys with it an easement for its support on that part of the wall which stands upon the other lot.⁴

3. Every wall of separation between two buildings is presumed to be the common party-wall, if the contrary be not shown, and this not only is a rule of positive ordinance; but is a principle of ancient law.⁵ If the common wall be in a state of ruin, and requires to be rebuilt, one party can compel the other, by action, to contribute to the expense of rebuilding it; but the necessity of the reparation must be established by the judgment of men skilled in the business, and made on due notice; and if the new

¹ Parker v. Foote, 19 Wend., 309; Banks v. American, etc., 4 Sandf. Ch., 438, 464; Palmer v. Wetmore, 2 Sandf., 316.

² Palmer v. Wetmore, 2 Sandf. R., 316; Myers v. Gemmel, 10 Barb., 537.

³ Wash. on Easements, 454.

⁴ Webster v. Stevens, 5 Duer, 553; Eno v. Del Vecchio, 4 Duer, 53, and 6 Duer, 17; 3 Kent Com., 437; Partridge v. Gilbert, 15 N.Y. R., 609, per Denio, C. J., and cases cited.

⁵ Campbell v. Mesier, 4 John. Ch., 334.

wall be made wider, or higher, or deeper, or thicker, the party building must bear the extra expense.¹ If he occupy no unnecessary time in completing the work and use proper care and skill in its execution he will not be responsible to the tenant of the adjoining building for damages resulting from its exposure to the weather, from loss of business or otherwise.²

4. So long as a party-wall is capable of answering the purpose for which it was erected the owner of either part may underpin the foundation, sink it deeper and increase its thickness within the limits of his own lot, or its length, or its height, if he can do so without injury to the building on the adjoining lot. But he cannot interfere with the wall in any manner unless he can do so without injury to the adjoining building; or unless he have the consent of the owner of such building. He cannot pare off the part of the wall that stands on his own land, so as to render the remainder insufficient or unsafe, or excavate under the party-wall upon his own premises, to the permanent injury thereof.³

5. Where the owner of a store granted to another the right of placing the wall of the third story of his house upon the top of the wall of the grantor's store, and of occupying the end of the store as the end of the house to be erected by the grantee, and the grantee erected his building accordingly, it was held to be the grant of an easement only, and to continue only as long as the wall stood, or in fee; and he was held to have a right to make use of it although the rest of the grantor's store had been burned down.⁴ But it seems, that, if the entire building, including the party-wall, be destroyed by fire, the parties are remitted

¹ Wash. on Easements, 458; Campbell v. Mesier, 4 John. Ch., 334; 3 Kent Com., 438; Partridge v. Gilbert, 15 N. Y. R., 601.

² Partridge v. Gilbert, *supra*.

³ Eno v. Del Vecchio, 6 Duer, 17; Webster v. Stevens, 5 Duer, 553; Phillips v. Bordman, 4 Allen, 147.

⁴ Brondage v. Warner, 2 Hill, 145.

to their original unqualified title to the division line, and he who rebuilds the wall must do so at his own expense.¹

6. The right of support of soil from soil has been recognized and protected by the courts, from the earliest times.² It is founded on natural justice and is essential to the protection and enjoyment of property in the land. Although it places a restraint upon what a man may do with his own property, it is in accordance with the maxim, *Sic utere tuo, ut alienum non lædas*. The right to lateral support is not like the support of one building upon another, to be gained by grant or prescription, but is a right of property passing with the soil. The principle is thus stated: "A man, who has land next adjoining my land, cannot dig his land so near mine, that thereby my land shall go into his pit."³ But this doctrine has always been strictly confined to those cases in which the owner of lands has not, by building thereon or otherwise, increased the lateral pressure upon the adjoining soil. For if the plaintiff has himself erected buildings upon the margin of his own lands, he is regarded as being himself at fault, and therefore not entitled to recover.⁴

7. But there seem to be certain qualifications of the principle last stated, to the effect that if the owner of both lots shall convey one lot and the dwelling thereon, that the right of support passes with the same for the benefit of whoever may be the owner thereof, and the owner of the adjacent lot takes it charged with the duty or servitude of supporting the house, as well as the natural soil on which it stands.⁵ So, if the house shall have stood so long as to have acquired a prescriptive right to such support, as an easement, and the owner of the adja-

¹ *Sherred v. Cisco*, 4 Sandf. 480; See opinion of Chief Justice Denio in *Partridge v. Gilbert*, 15 N. Y. R., 601.

² 2 Rolle Abr. Trespass, 1 pl. 1.

³ 2 Rolle Abr., supra; *Hay v. Cohoes Co.*, 2 Comst., 159; *Farrand*

v. Marshall, 19 Barb., 380; S. C. 21 Barb., 409.

⁴ *Id.*; *Lasala v. Holbrook*, 4 Paige, 169.

⁵ *Wash. Ease.*, 436, citing, among many other cases, *Eno v. Del Vecchio*, 4 Duer, 53.

cent parcel dig the same to the injury of such house, he will be held responsible.¹

8. Although one may dig in his own land, for all lawful purposes, and by so doing may injure a dwelling house recently erected by another upon the adjacent parcel of land, yet he has no right to do this carelessly, nor with an intent to injure the occupant of the neighboring tenement.²

9. Another easement which the courts are sometimes called upon to protect by injunction, is that of dedication, which arises from the devoting, or giving of property for some public use, and in such a manner as to conclude the owner. It is not essential that it be done in writing, but it may be done by an act *in pais*, as well as by deed.³ Nor is any certain period of time requisite to establish a dedication, as it depends, not on the lapse of time, but on the intent of the parties.⁴ It must originate in the voluntary donation of the owner of the land, and be completed by the acceptance of the public.⁵

10. The effect of a dedication is not to deprive a party of his land, but to estop him, while the dedication continues in force, from asserting that right of exclusive possession and enjoyment, which the owner of property ordinarily has. He retains a right to use the land in any way compatible with the use to which it is dedicated.⁶

11. The most usual subjects of dedication are highways and streets, but there are others, such as the dedication of a spring of water to public use,⁷ or land for a public square in a city, or for⁸ a public quay or landing-place upon the bank of a river,⁹ or for public commons, or for

¹ *Id.*; *Lasala v. Holbrook*, 4 Paige, 169.

² *Panton v. Holland*, 17 John, 92; *Wash. Ease.*, 436, and cases cited.

³ *Hunter v. Trustees of Sandy Hill*, 6 Hill, 407.

⁴ *Ibid.*

⁵ *Child v. Chappell*, 5 Seld., 256; *Clements v. West Troy*, 16 Barb., 251.

⁶ *Hunter v. Trustees of Sandy Hill*, 6 Hill, 407; *Post v. Pearsall*, 22 Wend., 451; *Wash. Ease.*, 137.

⁷ *McConnell v. Lexington*, 12 Wheat., 582.

⁸ *Trustees of Watertown v. Cowen*, 4 Paige, 510.

⁹ *New Orleans v. United States*, 10 Peter., 662, 712.

the site of a court-house or other public building,¹ or for a burying ground;² and it would seem that all sorts of easements and rights to enjoyment of land, whether for use or for pleasure which may be acquired by an individual by grant or prescription, may also be acquired by the public by actual dedication.³

12. The common law mode of indicating an acceptance by the public of a dedication is by a user of sufficient length to evince such acceptance, the length of time depending, of course, upon the circumstances of each case;⁴ but by the statutes of this state a mere user of streets or ways, as such by the public, does not constitute an acceptance or adoption of them as highways by dedication, unless there shall have been a location of the same, as public ways, by the proper officers of the town, city or county, authorized to make such location.⁵

13. Nor is it essential that the streets should have been opened or wrought, for where owners of city lots have sold them by a plan on which streets have been designated by the proper officers to locate and establish the same, and have bounded the lots sold by such streets, these are held to have been dedicated to public use.⁶ But the mere laying down of streets or squares upon the plot of a contemplated city or village, even though the same may be publicly exhibited or declared by the proprietors thereof, does not constitute a dedication of them to the public; there must be a sale of some of these lots, having reference to such streets or squares, and some adoption thereof

¹ *Hunter v. Trustees of Sandy Hill*, 6 Hill, 407.

² *Id.*

³ *Post v. Pearsall*, 22 Wend., 480, per Verplank.

⁴ *Wash. Ease.*, 139.

⁵ 2 R. S., 393 (5th ed.), *City of Oswego v. Oswego Can. Co.*, 6 N Y.

R., 257; *Clement v. Village of West Troy*, 16 Barb., 251; *Bissell v. N. Y. Cen. R. R. Co.*, 26 Barb., 630.

⁶ *Matter of Thirty-Second St.*, N. Y., 19 Wend., 128; *Matter of Twenty-Ninth St. 1 Hill*, 189; *Wyman v. Mayor of N. Y.*, 11 Wend., 486.

by the public, as such, in order to create a dedication of these to the public use.¹

14. And where a street has been dedicated to the public, and adjoining lands laid out with reference to it and improvements made accordingly, and the dedication accepted by the public, it cannot be revoked while the street continues in use.²

15. The jurisdiction of a court of equity to grant relief by injunction against a diversion or obstruction of a water course is well established;³ and a temporary injunction will be granted where it is made to appear that a final injunction will be proper.⁴

16. It is not necessary, in such cases, to allege in terms that the threatened injury will be great or irreparable, if it is apparent from the facts set forth, that such must be the effect; nor is it necessary first to establish a right at law. The foundation of jurisdiction in such cases, is the necessity of a preventive remedy, where great and immediate mischief would arise to the comfort and enjoyment of property, and the remedy is concurrent at law and in equity.⁵

17. And where the rights and relations of the parties to the use of water, are clearly fixed by contract, and one of the parties commits acts in violation of the contract, an injunction may be issued without regard to the question of damages or injury.

18. The general doctrine relating to water courses is, that every proprietor is entitled to the use of the flow of the water in the natural course, and to the momentum of

¹ Wash. Ease., 147; Clements v. West Troy, 16 Barb., 251; see further Mayor v. Stuyvesant, 17 N. Y. R., 34; Huttemire v. Albro, 18 N. Y. R., 48.

² Adams v. Saratoga and Wash. R. R. Co., 11 Barb., 414.

³ Olmsted v. Loomis, 9 N. Y. R.,

428; Belknap v. Trimble, 3 Paige, 600; Gardner v. Village of Newburgh, 2 John Ch., 162.

⁴ Corning v. Troy Nail Factory, 6 How., 94; 34 Barb., 492; 39 id. 327.

⁵ Gardner v. Newburgh, 2 John Ch., 165; Arthur v. Case, 1 Paige, 447; Olmsted v. Loomis, 5 Seld., 423.

its fall, on his own land; but though he may use the water while it runs over his own land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would descend to the proprietor below.¹ Chancellor Kent states the rule on this subject in the following elegant and satisfactory manner: "All that the law requires of the party, by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish, or affect the application of the water, by the proprietors above or below on the stream. He must not shut the gates of his dams, and detain the water unreasonably, or let it off in unusual quantities to the annoyance of his neighbor."²

19. This right to the usufruct of water, is a natural, permanent and inseparable incident or accompaniment, to the ownership of the soil, and is incapable of being divested by the act of any wrong doer, until twenty years adverse enjoyment have ripened the original wrong into a legal right.³

20. As a corollary to the above statements, it follows, that the owner of lands through which a stream of water flows, has a right, not only to have the water come to him in its natural course and quantity, uncorrupted and unchanged in temperature; but, also, the right to have it flow from his land, without obstruction, upon that of the inferior heritors.⁴ And this principle applies to surface water as well as to that flowing in a proper watercourse.⁵

¹ Van Hoesen v. Coventry, 10 Barb., 518; 3 Kent's Com., 439; Angell on Water Courses, §§ 90, 94.

² 3 Kent's Com., 440, 441.

³ Corning v. Troy Nail Factory, 39 Barb., 311.

⁴ Washb. Ease., 224; Brown v. Bowen, 30 N. Y. R., 519.

⁵ Washb. Ease., 225; Bellows v. Sackett, 15 Barb., 96.

The law is, that where one piece of adjoining lands lies lower than the other, the lower one owes a *servitude* to the upper, to receive the water that *naturally* runs from it, provided the industry of man has not been used to create the *servitude*.¹

21. A riparian proprietor may make a reasonable use of the water flowing through his lands, for domestic purposes, for watering cattle, or even for irrigation, provided that it be not unreasonably detained, or materially diminished. He must use it so as to do the least possible injury to his neighbor who has the same right as himself.² The reasonableness of the detention of the water by the upper proprietor must depend on the circumstances of each case, and is to be judged of by the jury as a question of fact.³ Two things, however, should be kept in mind in considering this subject. 1. that any diversion of water, properly so called, except for domestic use or purposes of irrigation, is a violation of the natural rights of property in riparian proprietors below; and 2. As it seems to be more than indicated by the cases, a riparian proprietor may not stop the flow of the entire stream by a dam, and set the same back for the purposes even of irrigation, if, thereby, he substantially deprives other proprietors upon the stream of the natural flow thereof.⁴

22. There is no more fit case for the interposition of a court of equity, by way of injunction, than the regulating of the rights of mill owners in the use of streams of water. It is so essential to the manufacturing interests of our country, and in fact to every branch of domestic industry, that it would be deplorable if any of these important establishments could be materially injured or destroyed by any person, or combination of persons, and the owners

¹ Washb. Ease., 226.

³ Washb. Ease., 236.

² Arnold v. Foot, 12 Wend., 330;

Crooker v. Bragg, 10 Wend., 264.

⁴ Washb. Ease., 239; Arnold v. Foot, 12 Wend., 330.

left to seek an uncertain remedy by an action for damages in a court of law.¹

23. The resort to an equitable forum seems consonant to the established practice in such cases, makes the relief final and comprehensive, avoids a multiplicity of suits, and is equally effective with an action at law in preventing the adverse possession of the defendant from ripening into a positive and perfect title.²

24. Every riparian owner has a right to a reasonable use of the water of a stream as it passes over his land, and for this purpose he may erect a dam and machinery, subject, however, to the limitation that the water must be so used as not seriously to interfere with the rights of owners of similar property above or below.³ The erection of a dam on a stream is necessarily injurious, in some degree, to those who have mills on the same stream below; yet such injury is *damnum absque injuriâ*, unless the waters be thereby diverted or detained in an unreasonable manner.⁴

25. But precisely to what extent the owner above may use or detain the water for manufacturing purposes does not seem to be very well defined; the question as to what is a reasonable use, depends necessarily upon the size of the stream, as well as the business to which it is subservient, and on the ever varying circumstances of each particular case.⁵

26. Where the defendants, by means of a dam and reservoir, had obtained control of the water of a stream, which they exerted to the great injury of the plaintiffs, who were mill owners below, sometimes withholding the water, and at others discharging it in torrents, an injunc-

¹ Per Walworth, Chancellor, in *Arthur v. Case*, 1 Paige, 447.

² *Corning v. Troy Nail Factory*, 6 How., 89; 34 Barb., 492; 39 Barb., 311 - 327.

³ *Van Bergen v. Van Bergen*, 3 John. Ch., 282; *Corning v. Troy*

Nail Factory, 6 How., 89; *Palmer v. Mulligan*, 3 Caines, 307.

⁴ *Palmer v. Mulligan*, *supra*; *Van Hoesen v. Coventry*, 10 Barb., 518.

⁵ *Thomas v. Brackney*, 17 Barb., 654.

tion *pendente lite*, was granted.¹ So, when the defendant, the owner of a rolling mill, stopped the entire water of the stream for more than an hour at a time, while he was heating his iron, and then let it out in such quantities as to run over the plaintiff's dam, and be wasted, whereby the plaintiff's mill was stopped from half an hour to two hours daily, the jury found for the plaintiff, and the court sustained the finding.² But a different rule has obtained in the courts of Pennsylvania, they holding that the owner of an upper mill may wholly stop the water for two or three days, till his pond can fill, or rise to a sufficient height to drive his works, notwithstanding lower mills suffer by reason of such detention.³

27. A mill owner has a right to set back the water in its natural state, by means of his dam, to the upper boundary of his own premises, and no further. Yet, he will not be liable, if, in time of extraordinary rise or freshet, the lands of an adjoining proprietor are flooded; but by "extraordinary freshets" are not meant those swells in the stream which ordinarily occur at certain seasons of the year. The owner of the dam is supposed to be aware of such freshets and must construct his dam in reference to them.⁴

28. But a mill owner may acquire a right by prescription to flow the lands of another by mean of a dam or obstruction in the stream upon his own land.⁵ Yet such right can only be acquired by an uninterrupted *adverse* enjoyment for twenty years. The uninterrupted enjoyment is *prima facie* evidence that it is adverse, but such conclusion may be rebutted, by showing that it was commenced and continued without claim of right.⁶

¹ Corning v. Troy Nail Factory, 6 How., 89.

² Merritt v. Brinkerhoff, 17 John., 306.

³ Hartzall v. Sill, 12 Penn. St., 248; Hoy v. Sterrett, 2 Watts, 327; Hetrich v. Deachler, 6. Penn. St.,

82; Wheeler v. Ahl, 29 Penn. St., 98.

⁴ Washb. on Ease., 259, and cases cited.

⁵ Stiles v. Hooker, 7 Cow., 266; Belknap v. Trimble, 3 Paige, 577.

⁶ Hart v. Vose, 19 Wend., 365.

29. The extent of the right to flow, in such cases, will be the height at which the water has been kept for twenty years, without reference to the height of the dam, and if the owner repair his dam which has kept the water at that height, so as to raise the water still higher and flow it further back upon his neighbors, he may be enjoined, although the dam remain at the same height.¹

30. So, a riparian proprietor may, by twenty years adverse user and enjoyment, acquire the right to divert the water of a stream, to the injury of mill owners and proprietors below.² Nor is it essential that the water should have been used, during the whole time, in the same precise manner, nor for the same purpose. The right does not relate to the purpose for which the water has been used, but to the manner and extent of the diversion.³

31. But the mere omission by one proprietor to make use of a right which belongs to him, however long continued, will not prejudice him or confer any right upon the adjoining proprietor.⁴ Nor does priority of occupancy alone give exclusive right to an undisturbed use of the water of a stream.⁵

32. After a long enjoyment of a water course, a right will be presumed and protected by injunction, without requiring the plaintiff to establish his right at law.⁶ So, mill owners who have for twenty years enjoyed the use of the water of a stream in a particular way, upon which use the principal value of their mills depends, are not compelled to establish their right at law, before coming into chancery for relief against an attempt to deprive them of such use.⁷ So, an injunction was granted to restrain a

¹ *Stiles v. Hooker*, 7 Cow., 266; see contra, *Wash. Ease.*, 263.

² *Arnold v. Foot*, 12 Wend., 330; *Belknap v. Trimble*, 3 Paige, 577.

³ *Belknap v. Trimble*, 3 Paige, 577; *Smith v. Adams*, 6 Paige, 435.

⁴ *Townsend v. McDonald*, 12 N. Y. R., 381.

⁵ *Platt v. Johnson*, 15 John., 213; *Merritt v. Brinkerhoff*, 17 John., 320.

⁶ *Gardner v. Newburgh*, 2 John. Ch., 162.

⁷ *Belknap v. Trimble*, 3 Paige, 577.

diversion of waters by means of a tunnel upon defendant's land.¹ So equity will enjoin a mill dam which may cause irreparable injury;² or restrain the defendant from increasing in height or keeping up a mill dam to the irreparable injury of the plaintiff's privilege above.³ Where hydraulic works are erected on opposite banks of a stream, if there is not sufficient water for a full supply of all, the owner on each side is entitled to an equal share of the water; and if the owner of the mills on either side has been in the quiet enjoyment of the water privilege, and the other attempts to deprive him of it, a preliminary injunction is proper.⁴ So, where the complainant claims title under a recent grant from the defendant himself, there is no principle upon which he can be required to bring a suit at law against the defendant for diverting the water, in violation of the express provisions of the grant, before applying to equity for relief; it is only where his right to the privilege claimed, admits of doubt, that the court requires a plaintiff to establish it at law, before granting an injunction.⁵

33. In no case, has a mill owner a right to *divert* the waters of a stream, and thereby deprive a lower proprietor of the benefit thereof, unless such right has been acquired by prescription;⁶ and he may not divert it, although such diversion was made for the purpose of enabling the mill owner to repair his works.⁷ Nor can he alter the level of the water either where it enters or where it leaves his property.⁸

34. The principles which apply to water flowing in cer-

¹ Reid v. Gifford, Hop., 416.

² Lyon v. McLaughlin, 32 Verm., 423.

³ Bemis v. Upham, 13 Pick., 169.

⁴ Arthur v. Case, 1 Paige, 447; Aff'd, Case v. Haight, 3 Wend., 632.

⁵ Seneca Woolen Mills v. Tillman, 2 Barb. Ch., 9.

⁶ Thomas v. Brackney, 17 Barb., 654; Sackrider v. Beers, 10 John., 241.

⁷ Van Hoesen v. Coventry, 10 Barb., 518.

⁸ Brown v. Bowen, 30 N. Y. R., 519.

tain and definite channels, are wholly inapplicable to subterranean waters, percolating through the earth, and which have no certain course or definite limits, but which ooze through the soil in every direction in which the rain penetrates. While, in the one case, a proprietor may be enjoined from obstructing or diverting the waters of a stream flowing in a surface channel; in the other, an adjacent owner may make any suitable or lawful use of his own land, although in so doing, he cut off or destroy the use of an underground spring or current of water, which has no known and definite course, but has been accustomed to penetrate and flow into the land of his neighbor.¹

35. It was the doctrine of the civil law, stated and approved by Tindal, C. J., in *Acton v. Blundell*, that, "If a man digs a well in his own field and thereby drains his neighbor's, he may do so, unless he does it maliciously." And it may be generally stated, as the law in this state, that an injunction will not be granted to restrain a defendant from sinking a ditch or shaft upon his own land, or from opening or working mines or quarries therein, by which the subterranean waters which would otherwise have run under the plaintiff's soil and have been useful to him, are cut off.²

36. When the sources of a spring existing upon the plaintiff's land, and which supplied a small stream of water flowing partly through the lands of each were intercepted and cut off by the ditching and quarrying of an adjoining proprietor, upon his own land, an injunction was refused.³ And, where a plaintiff operated his mill by water flowing from a well dug in his own premises,

¹ *Acton v. Blundell*, 12 Mees. & W., 336; *Greenleaf v. Francis*, 18 Pick., 117; *Goodale v. Tuttle*, 29 N. Y. R., 466; *Ellis v. Duncan*, 21 Barb., 230.

² *Ellis v. Duncan*, and other cases, *supra*.

³ *Ellis v. Duncan*, 21 Barb., 230.

and the defendant opened and sunk a coal mine in his own land, at a distance of three-quarters of a mile from the plaintiff's well, which had the effect to cut off the underground veins and currents which supplied such well, and to prevent him operating his mill, it was held that the defendant was not liable.¹

37. But subterranean streams that have certain and definite courses are governed by the same rules as surface streams.²

38. Another subject that may sometimes require the interposition of equity to regulate, is that of eaves drip. It is the duty of every man so to construct his buildings, that the rain water falling thereon, shall not drip or be discharged upon the land of his neighbor, unless he have such neighbor's consent therefor evidenced by an express grant, or by prescription; and it will be equally a wrong, whether the roof project beyond the line separating the two estates, or whether the roof be so constructed as to project the water beyond such line on to the contiguous estate.³

39. While the owner of upper land has a natural easement, as it is called, to have the water that falls upon his own land flow off the same, upon the land of an adjoining heritor below; yet he cannot collect it, and precipitate it in a body upon the land below. Nor is the inferior heritor obliged to construct sewers or ditches on his own lands for the purpose of draining the low, marshy land of an upper owner; and Denio, C. J., says in *Goodale v. Tuttle*: "In respect to the running off of surface water, caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet, and marshy places on his own soil for its amelioration and his

¹ *Acton v. Blundell*, 12 Mees. & W., 386.

² *Smith v. Adams*, 6 Paige, 435.

³ *Bellows v. Sackett*, 15 Barb., 96; Washb. Ease., 390.

own advantage, because his neighbor's land is so situated as to be inconvenienced by it."¹

40. It is a general principle that the bed of a fresh water river, to the centre of the stream, belongs to the owners of the adjacent banks; but if the stream be navigable the rights of the owners are subject to the servitude of the public interest for passage or navigation.² A river is navigable in the ordinary acceptance of the term when it is of sufficient depth naturally for valuable floatage, such as rafts, flat-boats and vessels of light draft.³ But a stream does not become navigable from the fact that logs can be floated thereon to market for a few days only in a year.⁴ An erection, on a navigable river, rendering the passage of boats, etc., inconvenient and unsafe, is a nuisance and may be remedied by injunction.⁵

41. But the beds of streams affected by oceanic tides, to high water mark, belong to the state, and the owner of lands adjoining has no private right or property in the waters of such streams, or in the shore between high and low water mark, and may be restrained by injunction at the suit of the attorney general, from erecting a nuisance or purpresture thereon.⁶ Where the bed of a stream belongs to the state, no person has a right to use the same, without its consent; but so long as the state officers make no objections to such appropriation, no individual or corporation has a right to complain of it.⁷

42. An injunction may also be granted, to restrain the threatened appropriation of land for the purpose of a

¹ Goodale v. Tuttle, 29 N. Y. R., 466; see Martin v. Riddle, 26 Penn. St., 415, in note.

² Commissioners v. Kempshall, 26 Wend., 404; Child v. Starr, 4 Hill, 369.

³ Curtis v. Keesler, 14 Barb., 511; Morgan v. King, 18 Barb., 277.

⁴ Morgan v. King, *supra*; Munson v. Hungerford, 6 Barb., 265.

⁵ *Ex parte Jennings*, 6 Cow., 527; People v. Vanderbilt, 25 How., 140.

⁶ People v. Tibbetts, 19 N. Y. R., 523; Gould v. Hudson R.R., 2 Seld., 522; People v. Vanderbilt, 25 How., 140.

⁷ Fort Plain Bridge Co. v. Smith, 30 N. Y. R., 44.

highway, where the proper steps have not been taken to secure a suitable compensation to the owner or to protect him from an improper appropriation.¹ Or to prevent the laying out and establishment of a road through a farm and improvements, without compliance with the requirements of the law.² So, it seems, the obstruction of a public street by fencing it, may be restrained by injunction.³

43. An injunction cannot be granted at the instance of a pew owner to restrain the trustees of the church from making alterations in the building and removing the pews.⁴

¹ *Anderson v. Commissioners, etc.*, 467 ; and see further *Hilliard on Inj.*, 12 Ohio St., 642 ; *McArthur v.* 454.
Kelley, 5 Ohio, 140.

² *Floyd v. Turner*, 23 Tex., 292.

³ *Langsdale v. Bouton*, 12 Ind.,

⁴ *Cooper v. First Pres. Church*, 32 Barb., 222.

SECTION V.

NUISANCES.

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. Definition — public and private. 2. Nuisance to dwelling house. 3. When injunction granted. 4. Injuries to enjoyment of life and property. 5. Slaughter house, etc. 6. Bowling alley — gunpowder. 7. Interference with business. 8. Emigrant depot — coal yard. | <ol style="list-style-type: none"> 9. Obstructing public street. 10. When such obstruction not a nuisance. 11. Appropriation of public property. 12. Things maintained by authority of legislature. 13. Who may have an injunction. 14. When nuisance erected first. 15. Not legalized by prescription. |
|---|--|

1. Another frequent ground for the interference of a court by injunction, is to restrain the continuance of public or private nuisances, purprestures, and the like. A public or common nuisance is an offense against the public, either by doing a thing which tends to the annoyance of the public generally, or by neglecting to do a thing which the common good requires.¹ A private nuisance is any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another.²

2. Nuisances to one's dwelling house are all acts done by another which render the enjoyment of life within the house uncomfortable, whether it be by infecting the air with noisome smells or with gases injurious to health.³ And the term *nuisance* is not limited to such erections or employments as are prejudicial to health, but embrace every thing that incommodes or offends, and renders the enjoyment of life and property uncomfortable.⁴

¹ Bac. Abr., title Nuisances.

² 3 Black.'s Com., 216.

³ 2 Greenl. Ev., 467, and cases;

•• Cropsey v. Murphy, 1 Hilton, 126.

⁴ Tanner v. Trustees, etc., 5 Hill, 121; Brady v. Weeks, 3 Barb., 157.

3. A court of equity will not interfere to prevent or remove a private nuisance, unless it has been erected to the annoyance of the right of another long previously enjoyed. It must be a case of strong and imperious necessity, or the right previously established at law, before the court will lend its aid.¹ Where a thing is in itself a nuisance, and the complainant's right is not doubtful, the court will grant an injunction to restrain irreparable mischief, without awaiting the result of a trial; but where the thing sought to be restrained is not, in itself, noxious, but only something which may, according to circumstances prove to be so, the court will await the result of a trial at law, or, in special cases, of an issue awarded by itself.² So, where a nuisance is likely to occasion a special injury to one individual, which cannot well be compensated in damages, equity will entertain jurisdiction of the case at his suit.³

4. The loss of health and sleep, of the enjoyment of quiet and repose, and of the comforts of home cannot be restored or compensated in damages, and any thing which deprives one of these may be enjoined; ⁴ nor is it essential to constitute a nuisance, that a trade or business should endanger the health of a neighborhood. It is sufficient if it produce that which is offensive to the senses, and impairs the enjoyment of life and property.⁵

5. Thus, a slaughter house in a part of a city where there are dwelling houses near it, and where lots are valuable for building purposes, is, *prima facie*, a nuisance, and may be enjoined.⁶ So a fat boiling establishment, if it infect the air with a noisome smell or with gases injuri-

¹ Van Bergen v. Van Bergen, 3 John. Ch., 282.

² Mohawk Bridge Co. v. Utica & Sch. R.R. Co., 6 Paige, 554; and see 9 Paige, 323.

³ Milhau v. Sharp, 28 Barb., 228.

⁴ Per Thompson, J., Dennis v.

Echart, Penn. Law. Rég., Jan., 1863, p. 169.

⁵ Catlin v. Valentine, 9 Paige, 575; Brady v. Weeks, 3 Barb., 157.

⁶ Catlin v. Valentine, *supra*; Brady v. Weeks, *supra*.

ous to the health, is a nuisance. So, a hog-yard, slaughter house, and fat and offal boiling house in an inhabited part of a city is, *prima facie*, a common nuisance; but the presumption may be rebutted by showing that the business is so carried on as not to endanger the health, or interfere with the comfort of the neighboring inhabitants.¹

6. It has been held in this state that a bowling, or nine-pin alley, kept for hire or emolument, is a public nuisance, at common law, though gambling therein be expressly prohibited by its owner.² So a gate kept up across a highway, after the right to take toll under a public grant has expired, is a nuisance.³ So, gunpowder deposited and kept in an exposed place, as in a wooden building in a city, is a public nuisance;⁴ but merely keeping gunpowder near a dwelling house, and near a public street, or transporting it through a public street are not nuisances, unless rendered so by particular circumstances, such as negligent keeping and the like.⁵ So, manufactories, lawful in themselves, may become nuisances, if carried on in parts of town where they cannot but greatly incommode the inhabitants, as manufactories of steam engine boilers, etc.⁶ And where the defendant had erected a marble works, with one wall of the building resting against the plaintiff's house, and it appeared that the latter was greatly injured by the vibrations caused by the motion of the defendant's engine and machinery, an injunction was granted restraining the defendant from running such machinery.⁷

7. An interference with the business of a duly licensed auctioneer, by posting before his auction room, a man with a placard warning people against *mock auctions*, is a private

¹Dubois v. Budlong, 15 Abbott, 445.

²Tanner v. Trustees, etc., 6 Hill, 121.

³Adams v. Beach, 6 Hill, 271.

⁴Myers v. Malcolm, 6 Hill, 292.

⁵People v. Sands, 1 John., 78.

⁶Fish v. Dodge, 4 Denio, 311.

⁷McKeon v. Lee, 28 How., 238.

nuisance which the court may enjoin; but when this is done by the mayor of a city* in pursuance of a statute directing the police to warn strangers against mock auctions, an injunction will not be granted, but the party will be left to his remedy at law.¹

8. An emigrant depot within a city is not, of itself, a public nuisance. Nor will an injunction be granted to restrain the erection of a building for such purpose. Its character must be established by the nature of the diseases of its inmates, the number of persons received, the peril to health arising from their presence, the location and many other circumstances peculiar to each individual case.² So, a coal yard is not, *prima facie*, a nuisance, although it may be so used as to become one.³ So, a person lying ill of an infectious or contagious disease in a hired room at a public hotel, or boarding house, is not a nuisance.⁴

9. One cannot legally carry on any part of his business in the public street to the annoyance of the public. The primary object of a street is to afford a free passage to the public, and any thing which impedes that free passage, without necessity, is a common nuisance. Thus, where distillers delivered their slops daily in the street to purchasers, and the street was obstructed by carts and teams resorting thither for it, and waiting for a load, the business was held to be a nuisance.⁵ So, the erecting and maintaining buildings, or obstructions in a highway, is a nuisance.⁶

10. But a temporary occupation of a street or highway by persons engaged in building, or in receiving or delivering goods from a store or warehouse, or the like, is allowed from the necessity of the case.⁷

¹ Gilbert v. Mickle, 4 Sandf. Ch., 357.

² Phoenix v. Com. of Emigration, 1 Abb., 466; Aff'd, 12 How., 1.

³ Russell v. Popham, Chan. Sent., 80; 3 Leg. Obs., 311.

⁴ Boom v. City of Utica, 2 Barb., 104.

⁵ People v. Cunningham, 1 Denio, 524.

⁶ People v. Lambier, 5 Denio, 9.

⁷ People v. Cunningham, *supra*.

11. Courts of equity have, likewise, jurisdiction to restrain any purpresture or unauthorized appropriation of public property to private use, which may amount to a public nuisance or may injuriously endanger or affect the public interest.¹ Any appropriation of a part of a public harbor exclusively and permanently to private use, without the consent of the legislature, is, *prima facie*, a nuisance, as where a canal boat is permanently located in a particular part of a canal basin for an unreasonable length of time;² and such nuisance may be restrained at the suit of the attorney general.³

12. But any thing maintained under the express authority of the legislature cannot be deemed a nuisance;⁴ unless there is an excess or irregularity in the exercise of the power conferred, in which case it becomes a public nuisance, *pro tanto*.⁵

13. A public or common nuisance will be restrained by injunction, at the suit of the attorney general,⁶ or of any private person specially injured by it;⁷ and where several persons are specially injured, they may all join in a prayer for an injunction;⁸ and the least special injury to an individual, by a public nuisance, entitles him to an action.⁹

14. If the plaintiff has built his house after the erection of the nuisance, he is nevertheless entitled to relief against it, upon the principle that every continuance of a nuisance is a new cause of action.¹⁰ And in the case of a

¹ Attorney General v. Cohoes Co., 6 Paige, 133.

² Hart v. Mayor of Albany, 3 Paige, 213; 9 Wend., 571.

³ Davis v. Mayor of N. Y., 2 Duer, 663; People v. Vanderbilt, 25 How., 140.

⁴ Harris v. Thompson, 9 Barb., 350; Williams v. N. Y. C. R.R. Co., 18 Barb., 222.

⁵ Renwick v. Morris, 3 Hill, 621; Aff'd, 7 Hill, 575.

⁶ Davis v. Mayor of N. Y., supra; People v. Vanderbilt, supra.

⁷ Milhau v. Sharp, 7 Abb., 220; 28 Barb., 228; Penniman v. N. Y. Balance Co., 13 How., 40.

⁸ Peck v. Elder, 3 Sandf., 129, note; Murray v. Hay, 1 Barb. Ch. R., 59.

⁹ Pierce v. Dart, 7 Cow., 609.

¹⁰ Brady v. Weeks, 3 Barb., 157; Beekwith v. Griswold, 29 Barb., 291.

noxious trade which constitutes a nuisance, it is of no consequence whether the complainant reside on his property or not. It is sufficient that the nuisance is calculated directly to damage the value by preventing profitable occupation, or to destroy the value of the property for building.¹

15. No length of time can legalize a public nuisance. It can never become valid by prescription. The maxim, *Nullum tempus occurit reipublicæ*, applies with peculiar force against a public nuisance.²

¹ Peck v. Elder, 3 Sandf., 129.

² Dygert v. Schenck, 23 Wend., 446; Mills v. Hall, 9 Wend., 815.

SECTION VI.

COVENANTS RELATING TO REAL PROPERTY.

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| 1. Courts of equity will enforce such covenants. | 5. Covenants by landlord. |
| 2. In what cases. | 6. When equity will not enforce covenants restricting use. |
| 3. Restricting use of leased premises. | 7. Building covenants. |
| 4. Covenants by purchasers. | 8. Sale of land. |

1. Injunctions are often applied for in connection with covenants relating to real property. A court of equity will recognize and enforce agreements concerning the occupation and mode of use of real estate, although they are not expressed with technical accuracy. Nor is it at all material that such stipulations should be binding at law;¹ nor that the breach of the agreement will not work irreparable injury to the plaintiff.²

2. In the case last cited, the vice-chancellor said: "The owner of land selling or leasing it, may insist upon such covenants as he pleases, touching the use and mode of enjoyment of the land; and he is not to be defeated, when the covenant is broken, by the opinion of any number of persons, that the breach occasions him no substantial injury. He has a right to define the injury for himself, and the party contracting with him must abide by the definition." And again the same learned judge remarks: "I think that in cases where the parties, by an express stipulation have themselves determined that a particular trade or business conducted by the one will be injurious or offensive to the other, and there is a continu-

¹ Per Bigelow, C. J., *Parker v. Nightengale*, 6 Allen, 344.

² *Steward v. Winters*, 4 Sandf. Ch., 587.

ing breach of the stipulation by the one, which this court can perceive will be highly detrimental to the other, and it is manifest that the extent of the injury is difficult to be ascertained or measured in damages, it is the duty of the court to restrain further infractions of the covenant, thereby preventing a multiplicity of suits at law, and, at the same time, protecting the rights of the complainant.”¹

3. Thus, where the parties covenanted that the leased premises should be used by the lessee for the regular dry goods jobbing business and no other, an injunction was granted to restrain the lessee from selling goods at auction.² So, where a store was leased, with a covenant that it should not be used for any other purpose than a jewelry and fancy goods store, an injunction was granted restraining the use of the tenement as a hat store.³ So, an injunction lies against a purchaser with notice, to prevent the use of a house as a family hotel, in violation of covenants entered into between owners and purchasers of the lot upon a part of which such house is built, not to carry on the business of an innkeeper.⁴

4. If the owners of land lay it out into house lots and orally agree among themselves that they shall be thus exclusively used, and convey the lots with a condition to that effect, any purchaser is bound by such agreement, and the owners of other lots may have an injunction enjoining him from converting a dwelling house into a public eating house.⁵ So, where the owner of land divided it into lots and sold them to different purchasers, with the condition or covenant that no livery stable, slaughter house, glue factory, etc., should be erected upon any part of the lots so conveyed, or any manufacture, trade or business, which might be offensive to the neighboring inhabit-

¹ *Steward v. Winters*, *supra*.

⁴ *Whatman v. Gibson*, 9 Sim., 196.

² *Id.*

⁵ *Parker v. Nightengale*, 6 Allen,

³ *Howard v. Ellis*, 4 Sandf., Sup. Ct., 369.

ants, it was held that the covenants in the deeds of the different lots were for the mutual benefit and protection of all the purchasers of such lots, and that the occupation of one of the lots as a coal yard was, upon the allegations of the bill, offensive.¹

5. So, where the owner of two adjoining lots, bounded by a river, erected a house on one, for his own use, and sold the other, the grantee covenanting that he would not use the lot in any way, or for any business offensive to the grantor, and that he would not use it for a stone quarry, such grantee was restrained from building a wharf on such lot.² So, where a lease of lands is made with a condition, expressed or implied, that the landlord shall permit natural ornaments, as a plantation of trees, to remain upon his own land in proximity to the premises leased, such condition may be enforced by injunction.³

6. Though such covenants do not run with the land, yet if an assignee have notice, at the time of the purchase of such covenant, equity will restrain him from violating it.⁴ But equity will not enjoin the use of leased premises for one purpose, merely because the lease contains a provision that they are to be used for another, unless it is also provided that they shall be used for the latter exclusively.⁵ So, in case of a covenant by a purchaser, restricting the mode of enjoyment of the purchased estate, equity will not enjoin a breach of such covenant by a second purchaser without notice; nor where no real injury is likely to arise; nor where there has been a change of circumstances; and an injunction against the erection of a building was refused, where the plaintiff had himself erected buildings, which defeated the object of the covenant.⁶

¹ *Barron v. Richards*, 3 *Edward's Ch.*, 96; 8 *Paige*, 351.

² *Seymour v. McDonald*, 4 *Sandf. Ch.*, 502.

³ *Nicholson v. Rose*, 4 *DeGex & Jones*, 10.

⁴ *Mann v. Stephens*, 15 *Simons's R.*, 377.

⁵ *Brugman v. Noyes*, 6 *Wis.*, 1.

⁶ *Bedford v. British, etc.*, 2 *My.*, 552.

7. Where adjoining proprietors covenant between themselves, to build in a certain manner, or upon a uniform plan, or on designated lines, equity will enforce such agreement, as against such owners or as against a purchaser with notice.¹

8. Injunctions are often granted in connection with contracts for the sale and purchase of real estate. But where the same object can be accomplished by the filing of a *lis pendens*, the injunction should be refused.² Where a non-resident has not sufficient property within the state to make good the damages for a breach of a covenant for quiet enjoyment, he will be enjoined from collecting the purchase money for the land, where the title is defective.³

¹ *Cole v. Sims*, citing; *Whitman v. Gibson*, 23 Eng. L. & Eq., 588.

² *Mills v. Mills*, 21 How., 437.

³ *Richardson v. Williams*, 3 Jones Eq., 116.

SECTION VII.

ROADS, RAIL ROADS AND BRIDGES.

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| <ol style="list-style-type: none">1. Remedy often invoked.2. When granted.3. Rail road in a street.4. Restraining works authorized by law.5. Powers of the corporation of New York.6. Cannot extend rail road without legislative grant.7. Proper remedy for property owners.8. Cases where rail road enjoined.9. When they will not be enjoined.10. Enjoining company from removing rails. | <ol style="list-style-type: none">11. Enjoining commissioners of highway.12. Restraining breach of contract.13. Unauthorized use of property.14. Covenant to stop train.15. Restraining erection of bridges.16. In what cases legislative authority necessary to build bridges.17. Cases where injunction was refused.18. Restraining private road, near plank road. |
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1. The remedy of injunction is often invoked in reference to rail roads, bridges, ferries and the like; and, although these subjects might have been properly treated of, under the head of *corporations*, it is thought that their importance would warrant a separate section.

2. An injunction will not be granted at the suit of one whose damages are not assessed to restrain the business of a rail road in actual operation until, at least, all ordinary remedies have been tried and found wanting.

3. A rail road track laid in a street pursuant to law, and so constructed as not materially to impair the public right of way, is not such a nuisance to the owners of property on that street as to authorize an injunction.¹ But when a judge has found that the extension of a rail road in a city is a public nuisance, that alone on a trial entitles the plaintiff to relief by injunction although no damages be shown.²

¹ Hamilton v. N. Y. & Harlem R.R. Co., 9 Paige, 171.

² The People v. Third Av. R. R. Co., 45 Barb., 63.

4. A court of equity cannot prevent the construction or use of a public work authorized by law; as a rail road tunnel under a city street authorized by the corporation, even on an allegation that the city corporation had exceeded its power in making the grant.¹ But the granting of a right of way to a street rail road, by the city corporation, is not an act of legislation, but a grant upon condition, and may be restrained by injunction.²

5. The corporate authorities of the city of New York have no power to confer upon individuals, by contract for an indefinite period, the franchise of constructing and operating a rail road in the public streets for their private advantage. Their power in respect to the control and regulation of the streets is held in trust for the public benefit and cannot be abrogated nor delegated to private individuals. So, that a resolution of the common council authorizing private persons to construct and operate a rail road upon certain conditions, without limitation as to time, or reserving a power of revocation, is void because it would deprive the corporation of the power to control and regulate the use of the streets.³

6. Nor can the common council of the city of New York authorize the extension of a rail road in that city, irrespective of any legislative grant, except, perhaps, when it may be necessary to the enjoyment of the principal legal grant.⁴

7. An injunction is the proper remedy for property-owners, who seek relief against the construction of a rail road in the streets of a city.⁵ And an individual owner may maintain an action to enjoin the construction of a rail road which would be a nuisance.⁶

¹ *Hodgkinson v. Long Island*, 4 Edw., 411.

² *People v. Sturtevant*, 5 Seld., 263.

³ *Milhau v. Sharp*, 27 N. Y. R., 611.

⁴ *People v. Third Avenue R. R. Co.*, 30 How., 121.

⁵ *People v. Law*, 34 Barb., 494; 22 How., 109.

⁶ *Milhau v. Sharp*, 28 Barb., 228; 27 N. Y. R., 611.

8. So, an injunction may be sustained against a rail road company to restrain it from constructing their road upon land acquired by it through a farm without making a farm crossing at the proper place.¹ So, where land has been gratuitously dedicated by the owner to the use of the public for a highway, a rail road company will be restrained from taking it for the use of the road without compensation, or consent.²

9. But a rail road company will not be restrained from excavating a highway, in anticipation that the bridge they intend to construct will not restore the highway to its former good condition.³ Nor will a company be restrained from building a rail road in a particular place, on the ground that the use of the locomotives there might or would be a nuisance.⁴

10. When a rail road has once been built and operated, the company will be enjoined from abandoning any portion of it, or removing the rails, unless in a case of the utmost necessity. The public have rights in it which should be protected.⁵ So, a rail road company may be enjoined at the suit of a bridge company from permitting persons to cross the bridge without paying the toll.⁶

11. An injunction will lie to restrain the commissioners of highways from taking possession of grounds acquired by a rail road company for the site of an engine house, etc., necessary for its use.⁷ So, where a rail road company alleges the right of way over a certain strip of land, and that the defendant is about to erect a flouring mill so near their track as not to leave sufficient room for its repair

¹ *Wheeler v. Rochester, etc., R. R. Co.*, 12 Barb., 227.

² *Williams v. N. Y. Cent. R.R. Co.*, 16 N. Y. R., 97.

³ *Baucus v. Albany Northern R.R. Co.*, 8 How., 70.

⁴ *Hudson & Del. Canal Co. v. N. Y. & Erie R. R. Co.*, 9 Paige, 322.

⁵ *People v. Albany & Vermont R. R. Co.*, 19 How., 523.

⁶ *Thompson v. N. Y. & Harlem R. R. Co.*, 3 Sandf. Ch., 625.

⁷ *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. R., 345.

and construction, an injunction may be granted to restrain the erection of the mill.¹

12. So when the defendant agreed with a rail road company, that they might open a carriage way to their station over his land ; and after it had been opened and used some months, he proceeded to close it on the ground of an alleged violation of the agreement by the company. It was held that the damage which would be sustained by the plaintiff would justify the interposition of the court by injunction, leaving the defendant at liberty to proceed for a specific performance of the contract.²

13. When a rail road, authorized by the legislature to take private property for specific purposes, uses the same for unauthorized purposes, the corporation will be restrained, at the suit of the original owner whose rights and comfort are prejudiced thereby.³ So, a rail road will be enjoined from using a highway without compensation to the owner of the fee.⁴

14. So a covenant to stop all trains at a certain station will be enforced by injunction.⁵

15. An injunction against the building of a bridge will not be granted unless the evidence clearly shows that the bridge, if erected, would be an obstruction to the navigation of the river.⁶ Works of a public nature are not arrested by injunction, unless in clear cases of illegality and imminent and irreparable injury.⁷

16. There are three cases in which authority from the legislature is necessary to erect a bridge over a stream : One is where the stream is navigable ; second, where the

¹ *Cunningham v. Rome, etc.*, 27 Geo., 499.

² *N. Y. and N. H. R. R. Co. v. Pixley*, 19 Barb., 428.

³ *Bostock v. North Staf. R. R.*, 3 Smale and Giff., 283.

⁴ *Williams v. N. Y. Cent. R. R.*, 16 N. Y. R., 111.

⁵ *Lindsay v. Gt. North. R. R.*, 19 Eng. L. and E., 87.

⁶ *Hutchinson v. Thompson*, 9 Ohio Rep., 52.

⁷ *Drake v. Hudson River R. R.*, 7 Barb., 508.

state owns the bed of the stream; and, third, where the right to take toll is desired.¹

17. But, though a bridge be built in one of the above cases without the authority of the legislature, no one, except the attorney general, can have an injunction to suppress it, unless specially injured. And where the plaintiffs were owners of a toll bridge, authorized by law, and the defendants were constructing a free bridge over the same stream at but a little distance, whereby the plaintiffs would be greatly injured by losing their custom, an injunction was refused on the ground that the bridge of the defendants would not be a nuisance unless it obstructed navigation, and the plaintiffs not being navigators, were not in a condition to complain.² So, where the plaintiff's charter prohibited a *ferry* within a certain distance of the bridge, it was held that such charter, being in derogation of the public rights, must be construed strictly, and an injunction was refused to restrain the defendants from erecting a *bridge* within one hundred rods of the plaintiffs' bridge.³

18. Where a company, incorporated to construct a plank road, had completed their road and erected a toll gate opposite the defendant's land, and the defendant opened and worked a road on his own land parallel to, and adjoining the plank road, so that it was passable for travelers, and was used by them to pass the gate, to the injury of the plank road company, an injunction was granted to restrain the defendant from keeping the road open so as to be used for the public travel.⁴

¹ Fort Plain Bridge Co. v. Smith, 30 N. Y. R., 63.

² Fort Plain Bridge Co. v. Smith, 30 N. Y. R., 63.

³ Mohawk, etc., v. Utica, etc., 6 Paige, 554.

⁴ Auburn, etc., v. Douglass, 12 Barb., 553.

SECTION VIII.

TAXES AND ASSESSMENTS.

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| 1. When the subject of equitable relief. | 4. Remedies at law. |
| 2. In what cases injunction proper. | 5. Multiplicity of suits—selling property |
| 3. Non-residents not to be relieved by. | of third persons. |

1. Taxes and assessments are not the subjects of equitable relief, except in special cases. Where the law has given to public officers, as assessors, a power which implies and requires the exercise of a sound judgment and discretion, the correction of their errors belongs to the supreme court as a matter of legal and not of equitable cognizance. In such cases a writ of *certiorari*, or of *mandamus*, or of *prohibition* will be the proper remedy, rather than an injunction.¹

2. But in special cases, where the matter is brought within some acknowledged head of equity jurisprudence an injunction may be granted; as where the tax or assessment asserts a lien upon real property; and the defect is not apparent upon the face of the proceedings, or where, perhaps, in the case of personal property, it is shown that the enforcement of such tax or assessment will be an irreparable injury, or will lead to a multiplicity of suits.² Or where the tax is upon land, and the law allows it to be sold, to satisfy the tax, and the conveyance, to be executed by the proper officer, would be conclusive evidence of title, and the proceedings are regular on their face, a suit in the nature of a bill *quia timet* will lie. But independ-

¹ Woodruff v. Fisher, 17 Barb., 224; Wilson v. Mayor, etc., 4 E. D. Smith, 675; see able opinion and analysis of cases in Wilson v. Mayor.

² Heywood v. city of Buffalo, 14 N. Y. R., 584; Van Beck v. Village of Rondout, 15 Abb., 48.

ently of such cases, there is no more reason for entertaining a suit of this character than there would be, where, in an action for money, a party had a judgment against him upon an erroneous rule of law.¹

3. An injunction will not be granted to restrain the collection of a tax alleged to have been illegally imposed upon the plaintiff, upon the ground that the plaintiff was a foreign corporation and had no place of business within the state.² Nor upon the ground that the plaintiff was a non-resident and had been duly assessed upon his personal property and paid taxes thereon, in the state where he resides.³

4. The law provides ample means for rectifying such assessment, either by affidavit, while the assessment roll remains in the hands of the assessors;⁴ or on the review of such assessment by the board of assessors or commissioners of taxes, on the application of any person conceiving himself aggrieved;⁵ or on an application to the board of supervisors to correct the roll and remit taxes;⁶ or by a writ of *certiorari*, *mandamus* or *prohibition*.⁷

5. An action in equity to restrain supervisors from imposing a tax which will be a lien upon the plaintiff's land, and a cloud upon the title, cannot be sustained upon the ground that it will prevent a multiplicity of suits, when it does not appear that any suits have been commenced or threatened against the plaintiff in respect to such tax.⁸ But an injunction will be granted to prevent an irresponsible officer from selling valuable property belonging to one person for a tax against another, upon condition that the tax be paid into court or a bond given for the amount.⁹

¹ *Susquehanna Bank v. Supervisors of Broome Co.*, 25 N. Y. R., 312.

² *Mutual Life Ins. Co. v. Supervisors*, etc., 33 Barb., 322; *Aff'd by Court of Appeals*, 32 How., 359.

³ *Wilson v. Mayor*, etc., 4 E. D. Smith, 675.

⁴ 1 R. S., 392-3; *Laws* 1850, ch. 120.

⁵ *Id.*

⁶ 1 R. S., 395, *Laws* 1844, chap. 250, § 2; 1850, chap. 120.

⁷ *Wilson v. Mayor*, etc., *ut supra*.

⁸ *Magee v. Cutler*, 43 Barb., 239.

⁹ *Fuller v. Allen*, 7 Abb., 12.

SECTION IX.

CONTRACTS.

- | | |
|--|--|
| 1. In restraint of trade. | 5. Conditional contribution. |
| 2. Positive and negative covenants. | 6. Goods pledged as security. |
| 3. Covenants in articles of partnership. | 7. Agreements in court; illegal contracts. |
| 4. Contracts for exclusive service. | |

1. Equity is sometimes called upon to interfere by injunction to restrain the breach of a contract or agreement, as an agreement not to exercise or practice some trade or profession within certain limits. The common law looks with disfavor upon contracts in restraint of trade, and a covenant not to exercise a trade *anywhere*, is void; but a covenant not to exercise a trade or calling within such reasonable limits, as would render competition possible is valid and will be protected by the court.¹ But where the contract itself fixes a penalty, as liquidated damages, the court will not interfere, but leave the plaintiff to his remedy at law.²

2. The court cannot refuse to grant an injunction to restrain the violation of a contract, because there may be some part of the agreement which the court cannot compel the defendant specifically to perform; as where the contract contains positive and negative covenants, or covenants to do certain acts, and not to do certain other acts. Thus, where the agreement consisted of two parts, one by the defendant not to carry on the business of a tailor within twenty miles of Cornhill, the other by the

¹ 2 Story's Eq. Jur., § 722 a; 2 Pars. on Con., 254. ² Vincent v. King, 13 How., 234.

plaintiff to employ the defendant and pay him certain wages, as long as he should carry on the business, and the defendant should conduct himself diligently and faithfully; although the court could not enforce the latter part, it could the former, and the defendant was enjoined accordingly.¹ And a contract not to carry on a trade within a certain limit, is violated by acting as an *employee* is such business and will be enjoined.²

3. So, where the articles of partnership contain an agreement by which each party covenants not to carry on any business, within one block of the premises occupied by the firm, within a certain limited period after the dissolution of the partnership, such covenant will be enforced by injunction.³

4. But, as a general rule, in this country, an injunction will not be granted to restrain a party from violating a contract to render exclusive service, for a certain time, to one employer. Thus, where an actor covenanted with a manager, not to perform for a limited period, at any other than his theatre, the court refused an injunction to restrain a breach thereof.⁴ So, where the defendant, a singer, agreed to sing at the plaintiff's theatre for a specific period, and that during that engagement she would not sing elsewhere, an injunction was refused to restrain a breach.⁵ So, under an agreement by the defendant, a danseuse, to dance at the plaintiff's theatre, or where he shall prescribe, with no negative or restrictive clause, the plaintiff cannot have an injunction to restrain a breach thereof.⁶ So, an injunction will not be granted to restrain an artist from violating an agreement to work for plaintiff.⁷ But a different rule is followed in England, and

¹ Rolfe v. Rolfe, 15 Simons, 88.

² Vincent v. King, 13 How., 234.

³ Shearman v. Hart, 14 Abb., 358.

⁴ Hamblin v. Dinneford, 2 Edw., 529.

⁵ Sanquirico v. Benedetti, 1 Barb., 315.

⁶ Butler v. Galletti, 21 How., 465.

⁷ Frederick v. Mayer, 13 How., 566.

violation of contracts, like the foregoing, will be restrained by injunction.¹

5. Where a person contributes to a fund for the erection and endowment of a literary and theological seminary, on condition that it should be permanently located at a specified place where it was accordingly located, an injunction was granted to restrain an illegal and unauthorized removal thereof to another place.²

6. Where the plaintiff admits that there is a balance due from him to the defendant, he cannot have an injunction and receiver to restrain the defendant from disposing of goods which he holds under a pledge as security for the amount due, without showing the defendant to be irresponsible.³

7. A stipulation or agreement made by a party in the presence of the court, touching the subject matter of the litigation, is a contract with the court as well as the adverse party, and the court will enforce it for the protection of the latter.⁴ But an illegal contract to which the party is a voluntary party will not be enforced.⁵

¹ *Lumley v. Wagner*, 13 Eng. Laws and Eq., 252; *Kemble v. Kean*, 6 Sim., 333.

² *Hascall v. Madison, etc.*, 8 Barb., 174.

³ *Bayard v. Fellows*, 28 Barb., 451.

⁴ *Banks v. American Tract Society*, 48 Sandf. Ch., 438.

⁵ *Bennett v. American Art Union*, 5 Sandf., 614.

SECTION X.

PATENTS, COPYRIGHTS, TRADE MARKS AND SIGNS.

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|---|---|
| 1. Patents. | 12. Marks denoting <i>quality</i> not enjoined. |
| 2. Copyrights, jurisdiction in case of. | 13. Names in common use. |
| 3. Manuscripts. | 14. Deceptive marks. |
| 4. Private letters. | 15. Sale of trade mark. |
| 5. Public lectures. | 16. Similarity of parties' names. |
| 6. Manuscript books. | 17. Names of magazines and newspapers. |
| 7. Evidence in an action. | 18. Names of hotels; places of amusement,
etc. |
| 8. Trade marks. | 19. Consent to use of trade mark. |
| 9. When imitation enjoined. | 20. Preliminary injunction granted only in
clear case. |
| 10. Imitation need not be perfect to justify. | |
| 11. Must be a clear case. | |

1. By the constitution of the United States, congress is empowered to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries. And, by successive acts of congress, the power of issuing injunctions in this class of cases is expressly vested in the courts of the United States.¹ In view of the foregoing provisions, it is decided in this state that the courts of the United States have exclusive jurisdiction, in cases of infringement of patents, and that the state courts cannot entertain an action instituted to restrain the infringement of a patent right.²

2. The jurisdiction with respect to literary works stands on the same ground with mechanical inventions, so that our state courts could grant no injunction to restrain the invasion of a copyright.³

3. Akin to the violation of a copyright is the publication of any manuscript without the consent of the author

¹ U. S. Const., Art. 1, § 8; 6 Laws U. S., 369; Laws of 1836, 242.

² Dudley v. Mayhew, 3 Comst., 9.
³ Id.

or legal owner, and it matters not whether it be a manuscript treatise, or letter written by or to him, either of business or friendship, or on any other occasion. By the act of congress of 1831, in relation to copyrights, it is enacted that any person or persons who shall print or publish any manuscript whatever, without the consent of the author or legal proprietor first obtained (if such author or proprietor be a citizen or resident of the United States), shall be liable to an action for damages, and the several courts of the United States are empowered to grant injunctions to prevent such publication of any manuscript, according to the principles of equity.¹ But the jurisdiction is not limited to the federal courts, and that of the state courts is concurrent. So, by the common law, an author has a right of property in his unpublished manuscripts, of any kind, without reference to their pecuniary value.²

4. The publication of private letters will be enjoined by the court, without regard to their literary merit or value, and this either in pursuance of the common law,³ or under the provision of federal laws above referred to.⁴ Though the right of property is enough to lay the foundation for an injunction to restrain the unauthorized publication of another's manuscript, or letters, still, it is believed, that, where the publication involves a breach of *trust and confidence*, a court of equity may, on that ground, alone, interfere.⁵ The writing and sending of a letter, does not give the receiver a right to publish it. That right remains in the writer, unless, where it is necessary for the receiver to publish the letter to maintain his action or defense in a court of justice; or to vindicate himself from any unjust aspersions cast upon him by the writer.⁶ Private letters

¹ Laws of 1831, chap. 15, § 9.

² Curtis on Copyrights, 84.

³ Woolsey v. Judd, 4 Duer, 379.

⁴ Bartlett v. Crittenden, 5 McLean,

⁵ Percival v. Phipps, 2 Ves. and B., 19; Eden on Inj., 325.

⁶ Woolsey v. Judd, 4 Duer, 379; 2 Story's Rep., 110, 111.

do not become assets in the hands of the receiver's administrator, and cannot be sold by him for the payment of debts.¹ An injunction was granted to restrain the publication of letters from an old lady, under a weak attachment to a young man, there having been an agreement not to publish the letters, but to deliver them up for a valuable consideration, and a sum of money having been actually paid to the defendant.²

5. So a public lecturer may enjoin the publication of his lectures or notes of the same, without his consent, and it is immaterial whether the lecture was written or oral. No person allowed, for fee or reward, to attend a lecture, has any right to publish, in any manner, such lecture. He may make notes or copies thereof for his own private use, but nothing more.³

6. So an injunction was granted against the printing of the manuscript of Lord Clarendon's History, a copy of which had been given by Clarendon to the father of the defendant, but not for publication.⁴ So the publication of a manuscript of a work on Bookkeeping may be enjoined, though the system is not complete.⁵ Where one is employed by the manager of a theatre to write plays, and in pursuance of that employment has written a drama, it amounts to an equitable assignment of the drama to the manager. But averring such facts on information and belief, is not sufficient to dissolve an injunction, granted at the suit of the author against a third person.⁶

7. But an injunction to restrain the publication of the evidence or proceedings in an action, can only be granted by the court in which the action is pending, and by an order in that cause.⁷

¹ *Eyre v. Higbee*, 35 Barb., 502.

² ——— v. *Eaton*, cited in 2 Ves. and B., 19; *Granard v. Dunken*, 1 Ball & B., 209.

³ *Mott v. Bell*, decided 1839, cited in Hoff. Pro Rem, 233; see also 2 Kent, 378.

⁴ *Queensbury v. Shebheare*, 2 Ed., 329.

⁵ *Bartlett v. Crittenden*, 5 McLean, 32.

⁶ *Jones v. Thorne*, 1 N.Y. Leg. Obs., 408.

⁷ *Wood v. Marvine*, 3 Duer, 674.

8. Somewhat analogous to the subject of patents and copyrights, is that of *trade marks*. The law of trade marks is of recent origin, and may be comprehended in the proposition that a dealer has a property in his trade mark. The ownership is allowed to him that he may have the exclusive benefit of the reputation which his skill has given to the article made by him, and that no other person may be able to sell to the public, as his own, that which is not his.¹ The question, in such cases, is not whether the complainant was the original inventor or proprietor of the article made by him, and upon which he now puts his trade mark; nor whether the article made and sold by the defendant, under the complainant's trade mark, is an article of the same quality or value. But the court proceeds upon the ground that the complainant has a valuable interest in the good will of his trade or business; and that, having appropriated to himself a particular label, or sign, or trade mark, indicating to those who wish to give him their patronage, that the article is manufactured or sold by him, or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who attempts to pirate upon the good will of his friends or customers, or the patrons of his trade or business, by sailing under his flag, without his authority or consent.² The law is perfectly clear that any one who has adopted a particular mode of designating his particular manufacture, has a right to say, not that other persons shall not sell exactly the same article, better or worse, or an article looking exactly like it, but that they shall not sell it in such a way as to steal his trade mark, and make purchasers believe that it is the manufacture to which that trade mark was originally applied.³

¹ Clark v. Clark, 25 Barb., 76.

² Farina v. Selverlock, 39 En. L.

³ Partridge v. Menck, 2 Barb. Ch., and Eq. R., 514.

9. An injunction ought to be granted whenever the design, apparent or proven, of a person who imitates a trade mark is, to impose his own goods upon the public as those of the owner of the mark, and the imitation is such that the success of the design is a probable, or even a possible consequence; and an injunction must be granted whenever the public is, in fact, misled, whether intentionally or otherwise.¹ Thus, where the manufacturer of steel pens used the mark "No. 303," to denote an extra quality of pens, and the mark "No. 753," to denote an inferior quality, the former being sold by him for 75 cents per gross, and the latter for 18 cents, the defendant was enjoined from removing the maker's labels from the boxes containing the inferior pens, and placing thereon labels, made in imitation of those used by the manufacturer to denote the superior pen.² So, the manufacturer of a soap, designated as the "Genuine Yankee Soap," was granted an injunction to prevent the use, by the defendant, of that name, and of labels and devices similar to those of the plaintiff.³

10. Nor is it necessary, to justify an injunction, that the resemblance between trade marks should be entire and perfect. It is sufficient that the intent of misleading the public, as to the ownership or origin of the goods, is apparent, and the court will enjoin any imitation which requires a careful inspection to distinguish its marks from the genuine.⁴ Thus where the plaintiff used the name or stamp of "Brooklyn White Lead Company," upon the kegs of white lead manufactured by them, the defendant was enjoined from labeling his kegs "Brooklyn White Lead and Zinc Company," but might label them "Brooklyn White Lead."⁵ So, an injunction lies against

¹ *Amoskeag Manuf. Co. v. Spear*,
² 2 Sandf., 599.

² *Gillott v. Kettle*, 3 Duer, 624.

³ *Williams v. Johnson*, 2 Bosw., 1.

⁴ *Id.*

⁵ *Brooklyn White Lead Co., v. Masury*, 25 Barb., 416.

the running of omnibuses, bearing names, words and devices which colorably imitate those on the omnibuses of the plaintiff.¹ So, where the plaintiff designated his manufactures by the term "Taylor's Persian Thread," and the defendant imitated the title and also form and color of the spools, envelopes, etc., an injunction was granted.² So, where the plaintiff gave a preparation prepared by him, the appellation of "Burnett's Cocaine," the defendant was enjoined from using the term "Phalon & Son's Cocaine."³

11. But where it is not clear that the complainants' trade marks are simulated in such a manner as to deceive his customers and the public, the court ought not to grant an injunction, until after the right has been established at law. Though the court will hold any imitation colorable which requires a careful inspection to distinguish it from the genuine, yet it is not bound to interfere where ordinary attention will enable a purchaser to discriminate. It is not sufficient to show that persons unable to read the labels might be deceived by the resemblance, but it must be shown that the ordinary mass of purchasers, paying that attention which persons usually do in buying the article in question, might be deceived.⁴ Thus, where the complainant put up and sold matches in boxes labeled "A. Golsh's Friction Matches," and the defendant used a label which was partly concealed by being turned under the cover, but which showed, when the box was closed, the words "Late Chemist for A. Golsh," and the defendant's place of business was stated, and the devices on the labels were materially different and the defendant's name was stated upon that part of the label which was beneath the cover. It was held that, as the difference was so great

¹ Knott v. Morgan, 2 Keen., 213.

² Taylor v. Carpenter, 2 Sandf. Ch., 603, 11 Paige, 292.

³ Burnett v. Phalon, 19 How., 530.

⁴ Partridge v. Menck, 2 Sandf. Ch., 622. 2 Barb. Ch., 101.

that a person in the habit of buying one article would not suppose that the other was the same article, an injunction should not be granted.¹ So, where the plaintiffs' trade mark contained the words: "Merrimack Prints—Fast Colors—Lowell, Mass," but the defendant's was in form: "English Free Trade—Merrimack Style—Warranted Fast Colors," it was held that the resemblance was not sufficient to warrant an injunction, pending a suit at law.²

12. Where words, marks or devices do not denote the goods or property, or particular place of business of a person, but only the nature, kind or quality of the article in which he deals, a different rule prevails. No property in such words, marks or devices can be acquired.³ Thus, where it appeared that such words as "Lake," "Cylinder" "Galen" and "New York" were used by manufacturers and dealers in glass to denote a certain quality of glass, an injunction was refused.⁴ So, where the plaintiffs claimed that their trade mark "A. C. A," used on their ticking, signified "Amoskeag Company, best quality," but it appeared on the other side that the label was used to denote best quality of the manufactory and was only an indication of quality, an injunction was not granted.⁵ So where it appeared that the term "Club House Gin" indicated merely the superior quality of the article, an injunction was refused.⁶

13. So, where the name or term has been in common use, as applicable to similar articles, prior to its use by the plaintiff, he can acquire no exclusive right to its use. As where it appears that the term "Schnapps" was in common use in "Schiedam" to designate gin, it was held,

¹ Partridge v. Menck, 2 Sandf. Ch., 622; Aff'd. on appeal, 1 How., app. case, 547.

² Merrimack, etc., v. Garner, 4 E D. Smith, 387.

³ Stokes v. Landgraff, 17 Barb., 608.

⁴ Id.

⁵ Amoskeag Manuf. Co. v. Spear, 2 Sandf., 599.

⁶ Corwin v. Daly, N: Y. Superior Ct., cited in Upton on Trade marks, 187.

that there could be no such exclusive right to the phrase "Aromatic Schiedam Schnapps" as would sustain an injunction.¹ So of the term "Essence of Anchovies."² So, it was held, by Mr. Justice Duer, in *Fetridge v. Wells*,³ that a trade mark right could not be acquired in the term "Balm of a Thousand Flowers," as applied to a perfumed liquid soap. But it was held otherwise by Mr. Justice Hoffman in *Fetridge v. Merchant*.⁴

14. The court will not interfere by an injunction, *in limine*, to protect a party in the use of trade marks which are employed to deceive the public, and to deceive them by fraudulent representations contained in the labels and devices which are claimed to constitute wholly, or in part, such trade marks. The court does not refuse to interfere from any regard to the defendant, who is using the same efforts and misrepresentations to deceive the public, but on the principle that it will not interfere to protect a party in the use of trade marks which are employed to deceive the public, and to deceive them by fraudulent representations contained in the labels and devices which are claimed to constitute wholly, or in part, such trade marks.⁵ So, a court will not interfere where the name of a compound is deceptive as to its ingredients, and the plaintiff's advertisement is deceptive as to its virtues.⁶ But, Mr. Justice Hoffman held in *Fetridge v. Merchant*, that if the article was innocuous, and the name merely a chemical untruth, the plaintiff should not be deprived of protection, and that the question should be judged of solely as between the immediate parties, and that the public should be left to its own guardianship.⁷ But the use of fictitious names as a trade mark upon articles of intrinsic value, will be pro-

¹ *Wolf v. Goulard*, 18 How., 64.

² *Burgess v. Burgess*, 17 En. L. and Eq., 257.

³ 18 How., 385; 4 Abb., 144.

⁴ 4 Abb., 156.

⁵ *Hobbs v. Francais*, 19 How., 567.

⁶ *Fetridge v. Wells*, 4 Abb., 144; S. C., 18 How., 385.

⁷ 4 Abb., 156.

tected. As where the plaintiff used, upon thread manufactured by them, the mark "Hall & Moody's Patent Thread, Barnesley," and the defendants offered to show that the thread was not patented, and that the thread was not made by Hall & Moody, nor at Barnesley, it was held that such facts would constitute no defense.¹ But in such cases the legal right should be first established at law.

15. Where B, who had acquired a reputation as a watch maker, and who stamped all watches made by him, with his name, sold to S, the right to stamp his name on all watches made by S, and S sold such right to the plaintiff, an injunction to restrain the defendant from selling genuine watches of the manufacture of B, and stamped with his name, was denied.²

16. In an alleged infringement of a right to trade marks, the court must ascertain whether the resemblance and differences are such as naturally arise from the necessity of the case, or whether they are simply colorable, and obviously intended to deceive the public. Where the similarity results from the like, or similar names of persons engaged in the same business, an injunction should not be granted.³

17. An injunction will be granted against publishing a magazine in the name of one who no longer authorizes it.⁴ Or against assuming the name of a newspaper published by the plaintiff, for the purpose of deceiving the public, and supplanting the good will of such paper.⁵ But the names, "Democratic Republican New Era," and "New Era," are too dissimilar to deceive the public.⁶

18. So the continued use of a name of a hotel will

¹ *Stewart v. Smithson*, 1 Hilton, 119; so held also in *Dale v. Smithson*, Com. Pleas Gen. Term, 1861, cited Hoff. Pro Rem, 248.

² *Samuel v. Berger*, 4 Abb., 88; S. C., 24 Barb., 163; 13 How., 342.

³ *Clark v. Clark*, 25 Barb., 76.

⁴ *Hogg v. Kirby*, 8 Ves., 215.

⁵ *Bell v. Lock*, 8 Paige, 75.

⁶ *Id.*

entitle a party to an injunction against its adoption by another. As where the plaintiff opened a hotel by the name of the "Irving House," which soon became known as the "Irving Hotel," as well as the "Irving House;" the defendant was enjoined from adopting the name "Irving Hotel," for another house.¹ So, the owner or conductor of a place of public amusement may have an injunction to prevent the use, by another of the name or designation adopted by him.² So, where the plaintiff and defendant were formerly copartners, an injunction may be granted to restrain the use by the defendant, of the signs containing the old firm name, without sufficient alterations to denote the change in the firm.³

19. But the consent of a manufacturer, or other person to the use or imitation of his trade mark by another, may be inferred from his knowledge and silence; but his consent whether expressed or implied, when purely gratuitous, may be withdrawn. It is merely a revocable license, and is no cause for refusing an injunction.⁴

20. A preliminary injunction to enjoin the defendant from the use of plaintiff's trade mark should in no case be granted, unless the legal rights of the plaintiff, and its violation by the defendant, are very clear. Where the title is in dispute, the course is to let the motion for an injunction stand over, until the plaintiff has established his legal title in an action at law.⁵

¹ Howard v. Henriques, 3 Sandf., 725. White Lead Co. v. Masury, 25 Barb., 416.

² Christy v. Murphy, 12 How., 77.

³ Peterson v. Humphrey, 4 Abb., 394.

⁴ Amoskeag Manuf. Co. v. Spear, 2 Sandf., 599; but see Brooklyn

⁵ Merrimack Manuf. Co. v. Garner, 2 Abb., 318; S. C., 4 E. D. Smith, 387; Samuel v. Berger, 24 Barb., 163; 13 How., 342.

SECTION XI.

NEGOTIABLE INSTRUMENTS, DEEDS AND STOCKS.

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|---|--|
| 1. General rule as to negotiable paper.
2. In what cases transfer of, enjoined.
3. What holder of negotiable paper must show, to enforce same.
4. Miscellaneous cases where transfer enjoined. | 5. Offsetting debts; notes given for valueless bills of exchange.
6. Transfer of stocks.
7. Sailing of ships.
8. Canceling deeds and instruments. |
|---|--|

1. "It is a general principle, applicable to the transfer of commercial paper, as bills of exchange, promissory notes and the like, that a transfer before the paper is dishonored carries no suspicion on the face of it, and the holder, receiving it on its own intrinsic credit, is not bound to inquire into any circumstances existing between the assignor and any of the previous parties to the bill or note, as he will not be affected by them, unless, indeed, the circumstances under which he takes the same be such as would naturally have excited the suspicion of a prudent and careful man. Hence, should the note or bill be affected with fraud in its inception, but transferred in the usual course of business, for a fair and valuable consideration, parted with at the time, and without notice of the fraud, or other infirmity in the title, it cannot be impeached by the maker."¹ A party, therefore, who has given a bill or note under circumstances which constitute a defense between the immediate parties, or where circumstances arise, after the giving of such an instrument, which would constitute a valid defense, the maker or

¹ Will. Eq., 359, and cases cited.

indorser may restrain the transfer of such instrument.¹ For should such note or bill be allowed to pass before maturity, into the hands of a *bona fide* holder, such defense would prove of no avail.²

2. Thus, where a check or negotiable paper is made and delivered to a person, for the sole purpose of having such person raise money on it and take up a check of the same amount, loaned to him previously by the plaintiff, and there is an express agreement between them that it shall be used for that purpose only, an injunction will be granted to restrain the defendant, who has received it from such person as collateral security for an antecedent debt, from negotiating it.³ So, where the drawer of two bills of exchange obtained the accommodation indorsement of the plaintiff by fraud, and negotiated the bills thus indorsed to the defendants, to meet an old indebtedness, and without receiving any new consideration, an injunction was granted to restrain the defendants from negotiating the bills, or from enforcing their collection.⁴

3. To entitle a holder of negotiable paper, which has been procured by fraud, to retain and enforce the same against the party defrauded, he must show that he paid value for it *at the time*, or incurred some responsibility, or relinquished some right, or discharged a precedent debt, upon the faith and credit of the paper.⁵

4. So, where it appears that an individual partner, indebted to the partnership, being unable to pay his separate bill holden by his bankers, substitutes for it by a negotiation with them, a partnership security, made and given without the consent or knowledge of his copartners, and the bankers are aware that it is so given, an injunction may be granted to restrain its negotiation.⁶ So, where a

¹ *Smith v. Haytwell, Ambler*, 67; *Chitty on Bills*, 120.

² *Smith v. Haytwell*, *supra*.

³ *Clark v. Gallagher*, 20 How., 308.

⁴ *Farrington v. Frankford Bank*, 31 Barb., 183.

⁵ *Id.*, and cases.

⁶ *Hood v. Aston*, 1 Russell Ch., 412.

person has negotiable securities in his possession, under a void contract, and is not of sufficient responsibility to answer for the value thereof, the negotiation of them may be restrained.¹ So, where a bill or note has been obtained upon an illegal transaction, as at play, an injunction may be granted to restrain the negotiation of such bill or note.²

5. Where there have been mutual dealings between parties, and there is cross indebtedness arising therefrom, a court of equity may interpose to offset one debt against the other, and adjudge the balance to be the sum equitably due; and, if the action is maintainable, an injunction to prevent one party who holds a negotiable note from transferring it, is proper.³ But, where negotiable notes have been given to purchase bills of exchange, which prove to be valueless, the purchaser of such bills is not bound to deliver them up or cancel them, in order to entitle himself to a preliminary injunction to restrain the vendor of the bills from negotiating the notes.⁴

6. The transfer of stock may also be enjoined under certain circumstances. Thus, where the officers of a corporation, which had become insolvent, had fraudulently issued false certificates of stock, an injunction was granted to restrain any further transfer of stock until a determination of the matter.⁵ So, where an officer of a corporation had issued spurious certificates of stock, an injunction was granted to restrain the payment of a dividend until it could be ascertained who were genuine stock holders.⁶ So, where an agent had used the money of his principal with that of his own in purchasing stock, which stood to his credit at his bankers, an injunction was granted restraining him from disposing of it until he showed by his

¹ *Delafield v. Illinois*, 2 Hill, 159; see 16 N. Y., 187.

² 4 Bouv. Inst., 128.

³ *Schieffelin v. Hawkins*, 1 Daly, 289.

⁴ *Leger v. Bonnaffe*, 2 Barb., 475.

⁵ *People v. Parker Vein Co.*, 10 How., 186.

⁶ *Underwood v. N. Y. & N. H. R. R. Co.*, 17 How., 537.

answer and an account, what belonged to his principal and what to himself.¹

7. "In most countries, it is said to be in the power of the majority, either in number or value, of the part owners, to send a ship on a voyage. But the court of admiralty has authority to arrest and detain the ship upon the application of a dissenting part owner, until security be given by the other part owners to the full value of his share. But if the respective shares be not apparent, and their amount be a subject of dispute, it has been said that it has not then the power to order security to be given. But, in such case, equity will interfere, and by injunction restrain the sailing of the ship till the amount of the share for which security is to be given shall be ascertained. But the court will decline to interfere if the plaintiff has been guilty of delay."²

8. Whenever a court of equity entertains a suit for the delivery up and cancellation of a deed or instrument, it will usually grant an injunction against transferring it, until judgment; and such suit will be entertained whenever such deed or instrument is capable of a vexatious use, after the means of defense at law may become impaired or lost, or when it is calculated to throw a cloud upon the title or interest of the party seeking relief, and the invalidity does not appear upon the face of the instrument itself.³

¹ Lord Chedworth v. Edwards, 8 Ves., 46.

² Will. Eq. Jur., 362.

³ N. Y. & N. H. R. R. Co. v. Schuyler, 17 N. Y. R., 592, 599.

SECTION XII.

ENJOINING ACTIONS AND JUDGMENTS.

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| <ol style="list-style-type: none"> 1. Effect of the Code. 2. When granted to stay actions. 3. Security, when action at issue. 4. Security after verdict and before judgment. 5. After judgment. 6. Security on staying real actions. 7. Such provisions not repealed by Code. 8. Staying actions in same court. 9. Should not be enjoined till at issue. 10. Staying actions in another court. 11. Exceptions to general rule. 12. Effect of proceeding in violation of the injunction. 13. Restraining mortgage foreclosure. | <ol style="list-style-type: none"> 14. Actions on bond for costs pending appeal; enjoining receiver. 15. Restraining justice's judgment. 16. Actions in another state. 17. Enjoined in special cases. 18. Effect of enjoining suits, etc. 19. Suits in United States court. 20. Summary proceedings for land. 21. Restraining enforcement of judgments. 22. When judgment will be enjoined. 23. Justices' court judgment. 24. Statutory security must be given. 25. Effect of injunction as to limitation of action. |
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1. The restraint of proceedings at law was, prior to the Code, one of the most important objects of injunctions, and gave rise to much controversy between courts of law and of equity; but the Code, by abolishing the distinctions between actions at law and suits in equity, and by permitting any defense to an action, either equitable or legal, to be made, has, to a great extent, done away with the necessity of equitable interference in such cases.¹

2. Injunctions to stay proceedings at law are sometimes granted before the action is at issue; sometimes after issue and before trial; sometimes after verdict and before judgment; and sometimes after judgment;² but the injunction does not operate upon the court, in which the action enjoined, is pending, but only upon the parties to the action.³ Nor does the jurisdiction spring from any superiority of a court of equity over a court of law, but

¹ Code, § 149.

² Will. Eq. Jur., 346.

³ N. Y. & New Haven R. R. Co. v. Schuyler, 17 How., 464.

originates in the fact, that the party complained of is making a use of the jurisdiction at law, contrary to equity and good conscience.¹

3. It is provided by the revised statutes that no injunction shall be issued to stay the trial of any personal action *at issue* in a court of law, until the party applying therefor shall execute a bond, with one or more sufficient sureties, to the plaintiff in such action at law, in such sum as the chancellor or master allowing the injunction shall direct, conditioned for the payment to the said plaintiff and his legal representatives, of all moneys which may be recovered by such plaintiff or his representatives, or the collection of which may be stayed by such injunction, in such action at law, for debt or damages and for costs therein; and also for the payment of such costs, as may be awarded to them in the court of chancery in the suit in which such injunction shall issue.² (See form No. 57.)

4. The statute also provides that no injunction shall be issued to stay proceedings at law in any personal action, *after verdict and before judgment*, thereupon, unless a sum of money, equal to the amount for which the verdict was given, and the costs of the suit shall be first deposited with the court of chancery, by the party applying for such injunction, or a bond for the payment thereof shall be given as thereafter directed.³ (See form No. 57.)

5. And further that no injunction shall issue to stay proceedings at law, in any personal action, *after judgment*, unless, 1st, a sum of money, equal to the full amount of such judgment, including costs, shall be first deposited by the party applying for such injunction, or a bond in lieu thereof be given, as thereafter directed; and, 2d, unless such party in addition to such deposit shall also execute a bond, with one or more sufficient sureties, to

¹ Will. Eq. Jur., 347.

² 2 R. S., 188, § 139.

³ Id., § 140.

the plaintiff in such judgment, in such sum as the chancellor or officer allowing the injunction shall direct, conditioned for the payment to the said plaintiff and his legal representatives of all such damages and costs, as may be awarded to them by the court at the first hearing of the cause.¹ (See form No. 57).

6. The foregoing provisions relate to personal actions, but in reference to real actions, it provides, that no injunction shall be issued to stay proceedings at law, in any action, for the recovery of lands, or the possession thereof, after verdict, unless the party applying therefor, shall execute a bond, with one or more sureties, conditioned for the payment to the plaintiff in such action, and his legal representatives, of all such damages and costs as may be awarded to them, in case of a decision against the party obtaining the injunction.

7. Such were the salutary provisions of the revised statutes, restrictive of the power of courts of equity to stay proceedings at law, and it is decided that the Code has not repealed or altered such provisions, but that they remain in full force.²

8. An injunction will not be granted in one action to stay the proceedings in another, where both are in the same court. The proper remedy is to make a motion, in the action to be stayed, upon notice for an order staying the proceedings therein until the decision in the other action.³ Before the Code, a suit at law might properly be enjoined until the determination of the suit in equity; but under the present practice, the same relief may be had by order, it being no longer necessary or proper to stay proceedings in the same court by injunction.⁴

9. But no order staying proceedings should be granted

¹ Id., § 141.

² Cook v. Dickerson, 2 Sandf., 691; 174, and cases.

Watt v. Rogers, 2 Abb., 261.

³ Harman v. Remsen, 23 How.,

⁴ Auburn City Bank v. Leonard, 20 How., 198.

until both actions are at issue, that the court may be in a condition to see that the merits of both can be tried in the one, and that a stay will not impair the rights and remedies of the party stayed.¹

10. Nor, as a general rule, will one court grant an injunction to restrain an action in another court of the state having coordinate jurisdiction. It ought not to be assumed that any court of the state will refuse to do justice, and one court should not interfere to prevent anticipated injustice in another by injunction. Such was declared to be the rule at a joint meeting of the judges of the supreme court, the superior court and the court of common pleas.² The rule was also approved in *Conover v. Mayor, etc.*, of N. Y., and it was there held that where a court, having adequate power for the administration of complete justice in the case, first obtains jurisdiction of the subject, it should confine litigation therein to itself, and that if either party attempts to divert litigation into another court, he should be restrained by injunction.³

11. But there are some exceptions to this general rule, arising from the necessity of the case, as where an action was brought for the ascertainment and cancellation of certain spurious certificates of stock, fraudulently issued by the transfer agent of a corporation, an injunction was allowed to restrain actions which had been commenced in other courts by the holders of such stock. But such injunction was only granted from the necessity of the case and to prevent a multiplicity of suits.⁴ So, where the plaintiff had pledged certain notes as collateral security for a debt, and had been sued as indorser upon them and judgment obtained; and he afterwards brought an

¹ *Fuller v. Read*, 15 How., 236; 6 Duer, 697.

² *Grant v. Quick*, 5 Sandf., 612; see also *Arndt v. Williams*, 16 How., 244.

³ 25 Barb., 513.

⁴ *N. Y. & New Haven R. R. Co. v. Schuyler*, 17 How., 464; another decision to the same effect in the same case, 8 Abb., 239.

action for a transfer of stocks, also pledged as security, and to restrain the enforcement of the judgment on the ground that the sum due had been tendered and a surrender demanded, an injunction was granted, on the ground that a stay of proceedings would not accomplish the whole object sought by the injunction.¹

12. Where one court enjoins a party from proceeding further in an action pending in another court of coordinate jurisdiction, and he proceeds, notwithstanding such injunction, his proceedings will not be set aside as irregular; but the party prejudiced will be relieved on such terms as may be just.²

13. Where an action was commenced in one court, to have a mortgage declared *void*, and the defendant commenced an action in another court, to *foreclose* the same mortgage, the latter court refused to restrain the suit before it, as the action for foreclosure covered the broadest grounds, and gave opportunity for rendering justice to both parties.³ So, an injunction will not be granted to restrain the holder of a mortgage from proceeding in his own way to foreclose such mortgage, merely because a subsequent incumbrancer prefers a different way; nor is it a reason for interference that the advertised time of sale is at a season of the year, when the property may not sell to the best advantage.⁴ But, when a mortgagor sent to the mortgagee a draft for part of a mortgage debt over due, saying that he might use the draft if he would extend the time of payment of the residue for one year, and the mortgagee accepted and used the draft, but refused to be bound by the condition, it was held that the mortgagor could maintain an action to restrain a foreclosure of the

¹ Chappell v. Potter, 11 How., 365.

³ Tarrant v. Quackenbos, 10 How.,

² Bennett v. LeRoy, 5 Abb., 55, S. 244.

C., 14 How., 178.

⁴ Bedell v. McLellan, 11 How., 172.

mortgage, and that he was not to be restricted to an action for damages.¹

14. Where a non-resident plaintiff appeals from a judgment rendered against him, and files security, and pending such appeal an action is commenced against the plaintiff and his sureties in the bond filed on the commencement of the action as security for costs, an injunction is not proper to stay such action, but a motion should be made for a stay of proceedings until the decision of the appeal.² But where one receiver brought an action, by leave of court, against another receiver of a different estate, to enjoin him from paying over moneys until ordered by the court, and a third party also brought an action against the same receiver for the same relief, an injunction was granted to restrain the proceedings in both actions, and a suit to compel the plaintiffs to interplead sustained.³

15. When a justice's judgment, regular on its face, is proved to have been rendered without jurisdiction, the supreme court will declare it void, and restrain all proceedings upon it.⁴

16. A court of this state will not, except in special cases, grant an injunction to restrain proceedings in an action already commenced and pending in another state;⁵ but it will grant an injunction to restrain the defendant from commencing an action in another state, when the subject of litigation can be properly adjudicated here.⁶ Thus, where a suit was brought between parties residing in this state, upon a contract made out of the state, but to be performed within the state, and the whole controversy could be effectually decided in such suit, the defendant was enjoined from commencing suits founded upon the same controversy in another state.⁷

¹ Grinnan v. Platt, 31 Barb., 328.

² Van Vleet v. Clark, 24 How., 190.

³ Winfield v. Bacon, 24 Barb., 154.

⁴ Cooper v. Ball, 14 How., 294.

⁵ Williams v. Ayrault, 31 Barb., 364; Mead v. Merritt, 2 Paige, 402.

⁶ Field v. Holbrook, 3 Abb., 377.

⁷ Id.

17. But there are special cases in which the courts of this state will restrain citizens of this state from proceeding in actions already pending in another state. "While, as a general rule," says Mr. Justice Ingalls, "the propriety of which is apparent, the courts of this state decline to interfere by injunction to restrain its citizens from proceeding in an action which has been commenced in the court of a sister state; yet there are exceptions to this rule, and when a case is presented fairly constituting such exception, extreme delicacy should not deter the court from controlling the conduct of a party within its jurisdiction to prevent oppression or fraud. No rule of comity or policy forbids it."¹ In the latter case the defendants, citizens of this state, had commenced an attachment suit in the courts of Vermont, against the Troy & Boston R. R. Co., also situated in this state, and had seized in the state of Vermont, and there held, a large amount of the rolling stock of such rail road company. Immediately after such seizure, proceedings were commenced under the laws of Vermont, to sell the said attached property, on the ground that it was liable to perish, waste, or to be greatly reduced in value by keeping, or could not be kept without great or disproportionate expense, which proceeding was entertained by the person who executed said attachment, on the application of the plaintiffs in said action in Vermont, and not by virtue of any order of the court in which said action was pending; and it did not appear that such court had any control thereof. The property thus attached, was, at the time of its seizure, subject to sundry chattel mortgages, executed by the said rail road company to the plaintiffs in the action here, to secure liabilities incurred by the mortgagees for said company; but such mortgages being unaccompanied by actual possession of the mort-

¹ Vail v. Knapp, Special Term, 3d District, Feb., 1867.

gaged property by the mortgagees, were not, as against creditors, recognized as valid by the courts of Vermont. The action here was brought by the mortgagees to restrain the sale of the property in Vermont. A temporary injunction was granted restraining such sale, and an order to show cause why the injunction should not be continued. On a hearing of the motion before Mr. Justice Ingalls, at special term, an order was granted, after a full and careful examination of the law and equities of the case, continuing the injunction and restraining the sale, until the final disposition of the said action against the rail road company in the state of Vermont.

18. In granting injunctions to restrain persons within this state from prosecuting suits either in the courts of this state, or of another state, or country, a court of equity proceeds, not upon any claim of right to interfere with or control the course of proceedings in other tribunals, or to prevent them from adjudicating on the rights of parties when drawn in controversy and duly presented for their determination. But the jurisdiction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction, and amenable to process, to restrain them from doing acts which will work an injury to others, and are, therefore, contrary to equity and good conscience. The court acts *in personam* upon the parties, and directs them, by injunction, to proceed no further in such suits and enforces obedience to its decree by process *in personam*.¹

19. The courts of this state will not grant injunctions to restrain proceedings in an action pending in the United States courts.² Nor has a United States court jurisdiction to enjoin proceedings in a state court.³

¹ 2 Story's Eq. Jur., § 899; Dehon v. Foster, 4 Allen, 550; Vail v. Knapp, *supra*, per Ingalls, J.

² Mariposa Co. v. Garrison, 26 How., 448.

³ Diggs v. Walcott, 4 Cranch, 180, 2 Curt (U. S.) 63.

20. The revised statutes provide that summary proceedings to recover possession of land shall not be stayed by any writ or order of any court or officer.¹ Some difference of opinions has existed as to whether or not this provision had been repealed by the Code;² but it seems now to be settled that such provision is still in force and that such proceedings can be restrained by injunction only in case of fraud, collusion or surprise.³ Thus, where the defendant in such proceedings had not time to reach the court room after the service of the summons on him, an injunction was granted to stay a warrant of dispossession.⁴ So where the tenant claimed a set-off, and a warrant of dispossession had been obtained against him by surprise, an injunction was granted, upon condition that he pay immediately the rent as claimed by the landlord.⁵ So when there is fraud on the part of the landlord an injunction will be issued.⁶ It has also been held that where the magistrate had no jurisdiction the proceedings might be enjoined;⁷ and likewise where the tenant had an equitable defense that he was unable to set up before the justice.⁸ But these last two decisions are in conflict with the leading decisions and may be considered as exceedingly doubtful.

21. Injunctions may also be granted in proper cases to restrain the enforcement of a judgment; but a judgment erroneous simply by reason of the defendants or his attorney's neglect, is not a proper case. It must appear that the judgment was obtained through surprise, accident, mistake or fraud.⁹ As where a party, having a good

¹ 3 R. S. (5th ed.), 839.

² The following cases held that it had been repealed: *Cure v. Crawford*, 5 How., 298; *Capet v. Parker*, 3 Sandf., 662.

³ *Forrester v. Wilson*, 1 Duer, 624; *Duigan v. Hogan*, 1 Bosw. 645; 16 How., 164; *Marks v. Wil-*

son, 11 Abb., 87; *Ward v. Kelsey*, 14 Abb., 106.

⁴ *Griffith v. Brown*, 28 How., 4.

⁵ *Forrester v. Wilson*, 1 Duer, 624.

⁶ *Ward v. Kelsey*, 14 Abb., 106.

⁷ *Capet v. Parker*, 3 Sandf., 662.

⁸ *Valloten v. Seignette*, 2 Abb., 121.

⁹ *Hil. on Inj.*, p. 165, and cases.

defense to an action, is prevented by the fraud of the plaintiff in the suit and others, from setting up that defense and a judgment is obtained against him without any negligence or fraud on his part, an injunction may be issued to restrain the enforcement of such judgment.¹ But an injunction will not be granted to stay proceedings on a judgment, on the ground that defendant was prevented, by public business, from making preparation and attending trial; and that by subornation of perjury plaintiff had recovered more than he was entitled to, and that a new trial had been refused.²

22. Where a judgment, which has been paid, is fraudulently kept on foot and sought to be enforced to the prejudice of a junior judgment, an injunction will be granted. So a landlord will be restrained from enforcing a judgment of dispossession, for non-payment of rent, if the judgment has been obtained by surprise, as where the defendant had not time to reach the court room after the service of the process and before the trial.³ So, if after recovering judgment, the judgment creditor enter into a new contract qualifying his rights under such judgment, he may be restrained from proceeding in violation of that contract.⁴ But a court will not restrain the collection of a judgment which has been obtained without fraud or mistake upon issue joined, and as the result of a litigation, unless it is shown that the execution of the judgment will be contrary to equity and good conscience, and that the facts which render the judgment inequitable were not available as a defense in the action.⁵

23. So, where a judgment of a justice's court is regular on its face, but void for want of jurisdiction, the supreme

¹ *Huggins v. King*, 3 Barb., 616.

² *Smith v. Lowry*, 1 John. Ch., 320.
Woodworth v. Van Buskerk, id., 432.

³ *Forrester v. Wilson*, 1 Duer, 624;
Griffith v. Brown, 28 How., 4.

⁴ *Van Wagenen v. LaFarge*, 13 How., 16.

⁵ *Clute v. Potter*, 37 Barb., 199.

court may, by injunction, restrain all proceedings on it.¹ Or where a judgment has been regularly taken, in such court, but which ought on equitable grounds to be vacated, its enforcement may be restrained, as such court has no power to vacate its own judgments.²

24. But as has been before stated (pl. 5) the statutes have provided that proceedings on a judgment shall not be restrained unless security be given as therein provided, and it is held that the Code has not repealed or altered such provision.³ An injunction cannot be issued to stay proceedings at law on a judgment or verdict, except those provisions are complied with, and the injunction; if issued without a compliance with those terms, will be set aside for irregularity.⁴

25. When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction, or prohibition, shall not be part of the time limited for the commencement of the action.⁵ So, the time during which a party recovering a judgment shall be restrained from proceeding thereon, by any injunction of any court, shall not constitute any part of the ten years limited as the period of active liens of injunctions; but to entitle any party to such deduction he shall within ten years from the docketing of the judgment, file with a clerk of the court in which such judgment was obtained, a notice specifying the injunction by which proceedings on such judgment shall have been restrained, and the time of service thereof, and if such restraint shall have ceased, such party shall specify the duration thereof.⁶

¹ *Cooper v. Ball*, 14 How., 295, and see *Moore v. Lyttle*, 4 John. Ch., 185.

² *Martin v. Mayor, etc.*, 20 How., 86; 11 Abb., 295, Aff'd 12 Abb., 243.

³ *Cook v. Dickerson*, 2 Sandf., 691; *Watt v. Rogers*, 2 Abb., 261.

⁴ *Cook v. Dickerson*, 2 Sandf., 691; *Jenkins v. Wild*, 2 Paige, 394; *Christie v. Bogardus*, 1 Barb. Ch., 167.

⁵ Code, § 105.

⁶ 3 R. S., 5th ed., 637.

SECTION XIII.

IN CREDITOR'S SUITS.

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| <ol style="list-style-type: none"> 1. Provision of revised statutes as to. 2. Not abolished by the Code. 3. What creditor must show to maintain;
receiver. | <ol style="list-style-type: none"> 4. Assignee suing pending injunction,
guilty of contempt. 5. Confessing judgment when contempt. 6. Carrying into effect a previous assign-
ment. |
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1. "Whenever an execution against the property of a defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendant and any other person, to compel the discovery of any property, or thing in action belonging to the defendant; and of any property, money or thing in action, due to him or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof to the defendant, except where such trust has been created by, or the fund so held in trust has proceeded from some person other than the defendant himself."¹

2. So far as regards obtaining a discovery by means of this form of proceeding, the above provisions are entirely superseded, and, in fact, repealed by section 389 of the Code. The other relief for which the section provides is, however, still obtainable by means of this form of procedure, and, therefore, with the above exception, they may be looked upon as still existent, and unrepealed in matters of substance, though abolished, as regards pure

¹ 3 R. S., 5th ed., 264, § 48.

matters of form, where inconsistent with the mode of procedure prescribed by the Code.¹

3. To enable a creditor to maintain an action under the above provision, he must be a judgment creditor and he must show that he has exhausted his remedies at law on the judgment, that is that an execution has been issued and duly returned. A simple contract creditor cannot maintain the action.² But an attaching creditor has before judgment a sufficient lien for that purpose.³ A mere contract creditor cannot maintain an action against a defendant and his fraudulent assignee, to restrain the latter from disposing of the assignee's property and to have the assignment declared void.⁴ Where the plaintiff obtains an injunction to restrain the defendant from disposing of his property, it is his *duty* to apply for a receiver, and if he neglect to do so the injunction will be dissolved.⁵

4. Where, in a creditor's suit against an assignor and assignee, to set aside a general assignment as illegal and void, an injunction was granted, restraining the defendants from disturbing, holding possession of, or interfering in any manner with the effects of the assignor, it is a violation of the injunction, and a contempt of court, for the assignee thereafter, to bring an action against the plaintiff and others, to collect choses in action belonging to the assignor.⁶

5. Though, confessing judgment would not be a violation of an order in a creditor's suit, any actual interference by the defendant with his property, as procuring an execution to be issued on behalf of another creditor and taking

¹ Whittaker's Practice, vol. 1, p. 921, citing Catlin v. Doughty, 12 How., 457; Hammond v. Hudson R. Ins. Co., 20 Barb., 378, etc.

² Reubens v. Joel, 3 Ker., 488; see also Bayaud v. Fellows, 28 Barb., 451; Cropsey v. McKinney, 30 Barb., 47.

³ Rinchey v. Stryker, 26 How., 75; Greenleaf v. Mumford, 30 How., 30.

⁴ Reubens v. Joel, *supra*.

⁵ Osborn v. Heyer, 2 Paige, 343; Bloodgood v. Clark, 4 Paige, 574.

⁶ Smith v. N. Y. Consolidated Stage Co., 28 How., 277.

his property to the sheriff, would be a violation.¹ But, confessing judgment with a view to defeat the remedy of the plaintiff in a creditor's suit and interposing delay, so as to secure the prior appointment of a receiver in a proceeding upon the confessed judgment, is a violation of the injunction in the creditor's suit and a contempt of court.²

6. So, merely carrying into effect, by procuring novation, a previous assignment of a right of action, is not a breach of injunction in a creditor's suit; as, where an officer, having unaudited claims against a county, assigned specific portions to various persons, in payment of debts, agreeing to give orders in favor of the assignees, and was afterwards served with an injunction in a creditor's suit; and, subsequently, when the claims were audited, requested supervisors to issue orders in pursuance of such assignment, it was held to be no breach of the injunction.³ See further on this subject post, chapter v.

¹ *Lansing v. Easton*, 7 Paige, 364.

³ *Richardson v. Rust*, 9 Paige, 243;

² *Ross v. Clussman*, 3 Sandf., 676. see *Ireland v. Smith*, 3 How., 244.

SECTION XIV.

CORPORATIONS.

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| <ol style="list-style-type: none"> 1. May be enjoined. 2. Injunctions against, how granted. 3. Provisions of revised statutes concerning. 4. Alienation of property. 5. On whose application, visitatorial power exercised. 6. When stockholder cannot have receiver on preliminary injunction. 7. Corporation a necessary party. 8. Directors cannot discontinue corporate business. 9. Corporation dissolved after one year's suspension. 10. What acts amount to a suspension. 11. Corporations having banking powers when enjoined. 12. Restraining proceedings at law by creditors. 13. How creditors are to make themselves parties. 14. Wrongful acts by directors: neglect to hold election. 15. Moneyed corporations; statutory definition. 16. What acts unlawful in directors of moneyed corporations. 17. Transfers with intent to give preference; when void. 18. Restraining creditors from obtaining judgments. | <ol style="list-style-type: none"> 19. Banks formed under the act of 1838. 20. When a majority of a corporation cannot control. 21. Restraining opening of transfer books. 22. Payment of dividend, when restrained. 23. Application by the attorney general. 24. Statute of 1849. Injunctions against banking associations. 25. Of the hearing before judge, injunction continued till claim paid. 26. When declared insolvent, and restrained. 27. On application of stockholders, when injunction granted. 28. Suspension of specie payment no proof of insolvency. 29. Injunction against <i>municipal corporations</i>. 30. Will not enjoin passage of resolution or ordinance. 31. Control and regulation of streets. 32. Granting easement in a street. 33. Restraining appropriation of money. 34. Enjoining wrongful injury to another. 35. Enjoining assessments. 36. Who may have an injunction. 37. Religious corporations. 38. All officers and members restrained by injunction against corporation. 39. How enforced against corporation. |
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1. Corporations, both municipal and private, may sue and be sued in all courts in like cases as natural persons; and a court of equity may restrain them from any illegal, corrupt, fraudulent or oppressive exercise of their corporate powers. But where the injunction, *in limine*, is sought on the ground of fraud, or corruption, some particular act of fraud or *prima facie* evidence of corruption should be

shown;¹ and where there is to be a trial involving a forfeiture of corporate rights, a preliminary injunction will not be granted unless it appear from the papers before the court that serious injury will follow the refusal.²

2. An injunction to suspend the general and ordinary business of a corporation can only be granted by the supreme court, or a judge thereof; nor can it be granted without due notice of the application to the proper officer of the corporation, except when the people of this state are a party, or in proceedings to enforce the liability of stockholders in corporations and associations for banking purposes, as such proceedings are or shall be provided by law; or unless the plaintiff shall give the undertaking required by the Code.³

3. Although the Code has abolished the distinction between actions at law and suits in equity, yet the proceedings against corporations in equity, as provided by the revised statutes, are preserved by section 471 of the Code, and provision made for securing them by civil action in conformity to that act. By the revised statutes it is provided that "upon a civil action being commenced by the attorney general, in the supreme court, it shall have power to restrain by injunction any corporation from assuming or exercising any franchise, liberty or privilege, or transacting any business, not allowed by the charter of such corporation; and in the same manner to restrain any individuals from exercising any corporate rights, privileges, or franchises, not granted to them by any law of this state."⁴ "Such injunction may be issued before the coming in of the answer, upon satisfactory proof that the defendants, complained of, have usurped, exercised or claimed any franchise, privilege, liberty or corporate

¹ *Davis v. Mayor, etc.*, of N. Y., 14 N. Y. R., 506; *Champlin v. Mayor, etc.*, of N. Y., 3 Paige, 573.

² *People v. Harlem Bridge Co.*, 1 Abb., N. S. 169 note.

³ Code, § 224.

⁴ 3 R. S. (5th ed.), 762, § 39.

right not granted to them; and after the coming in of the answer such injunction may be continued until judgment at law shall have been had.”¹

4. The statutes also provide that the supreme court shall have jurisdiction over directors, managers and other trustees and officers of corporations, to set aside all alienations of property made by the trustees or other officers of any corporation contrary to the provisions of law, or for purposes foreign to the lawful business and objects of such corporation, in cases where the person receiving such alienation knew the purpose for which the same was made; and to restrain and prevent any such alienation in cases where it may be threatened, or there may be good reason to apprehend it will be made.² It further provides that the jurisdiction conferred by the section cited above shall be exercised as in ordinary cases, on bill or petition, as the case may require or the supreme court may direct, at the instance of the attorney general, prosecuting in behalf of the people of this state, or at the instance of any creditor of such corporation, or at the instance of any director, trustee or other officer of such corporation having a general superintendence of its concerns.³

5. The visitorial power conferred by the above sections, can only be exercised by the supreme court, on the application of the attorney general, prosecuting in behalf of the people of this state, or at the instance of a creditor of the corporation, or of a director, trustee or other officer having a general superintendence of its concerns. An action cannot be brought under this statute by a stockholder, against the corporation and its trustees, to have the corporation dissolved, and to restrain the exercise of corporate power; to restrain the trustees from exercising

¹ 3 R. S. (5th ed.), 762, § 40.

² Id. § 41, subs. 7, 8.

³ 3 R. S. (5th ed.), 763, § 43.

any powers as trustees, and for the appointment of a receiver and the sale of the property of the corporation; nor can the court entertain such an action, or grant the relief prayed for under its general powers as a court of equity.¹

6. In no case, except in respect to moneyed corporations, or insolvent corporations, can a stockholder have a receiver appointed on a preliminary injunction, with authority to take entire possession of the corporation, and thereby work its dissolution. Yet, on the application of a stockholder charging fraud against some of the trustees or directors, *it seems* such directors or trustees may be restrained by injunction from committing any such fraudulent acts as are charged. But such injunction should apply only to the particular acts complained of, and not to the general business of the corporation.²

7. Upon a bill filed prior to the adoption of the revised statutes by certain stockholders of an incorporated company, against the individual directors for fraud and mismanagement in the execution of their trust, by which the property of the corporation was dissipated and lost, it was held that the corporation was a necessary party, either as complainant or defendant.³

8. The directors of a corporation, even with the consent of the stockholders, are not authorized to discontinue the corporate business, and to distribute the capital stock among the stockholders, unless they are specially authorized by a legislative act, or by a decree of a court of equity dissolving the corporation in the manner prescribed by law.⁴ Where the money which should have been divided among the stockholders, is applied contrary to the charter, or articles of agreement, it is a breach of trust, and a

¹ Howe v. Deuel, 43 Barb., 504.

² Howe v. Deuel, *supra*.

³ Robinson v. Smith, 8 Paige, 222.

⁴ Ward v. Sea Ins. Co., 7 Paige, 294.

fraud on the part of the majority towards the minority, who may have remedy by injunction.¹

9. Whenever any incorporated company shall have remained insolvent for one whole year, or for one year shall have neglected or refused to pay and discharge its notes or other evidences of debt, or for one year shall have suspended the ordinary and lawful business of such corporation, it shall be deemed to have surrendered the rights, privileges and franchise granted by any act of incorporation, or acquired under the laws of this state, and shall be adjudged to be dissolved.²

10. When a corporation which had been incorporated for the purpose of making marine insurance and of lending money upon bottomry and respondentia security, suspended the business for which it had been incorporated, for more than a year, under a formal resolution to that effect, by the board of directors, it was held that the corporation had forfeited its charter, and was liable to be dissolved under the above provision of the statute, although the company in the mean time had attended to the adjustment of losses upon risks previously assumed, and to the business of collecting in and securing the corporate fund.³ So, where a manufacturing corporation made a lease of all its works and property to its president, who owned a majority of its stock, for a period of two years and a half, and the business of the corporation was continued by the lessee, in the same manner as before the lease was given, it was held that the lease was void because it was the act of the stockholders and not of the directors, by whom alone a corporation could act, and, also, because the effect of such lease was to suspend the ordinary business of the corporation for more than a year

¹ *March v. Eastern, etc.*, 43 N. H., 294; see *In the Matter of the Jackson Marine Ins. Co.*, 4 Sandf. Ch., 515.

² 3 R. S. (5th ed.), 763, § 46.

³ *Ward v. Sea Ins. Co.*, 7 Paige,

559.

and thus amounted to a surrender of its rights, privileges and franchises, within the above section.¹ But in order to infer a surrender of corporate franchises from insolvency or suspension of business for less than a year, the circumstances must be such as to show that the corporation had lost all power to continue, or to resume its business.²

11. Again, the statute provides that "Whenever any corporation having banking powers, or having the power to make loans on pledges or deposits, or authorized by law to make insurances, shall become insolvent or unable to pay its debts, or shall have violated any of the provisions of its act, or acts of incorporation, or of any other act binding on such corporation, the supreme court may, by injunction, restrain such corporation and its officers from exercising any of its corporate rights, privileges or franchises, and from collecting or receiving any debts or demands, and from paying out or in any way transferring or delivering to any person any of the moneys, property or effects of such corporation until such court shall otherwise order."³ "Such injunction may be issued on the application of the attorney general in behalf of this state or of any creditor or stockholder of such corporation, upon action commenced for that purpose, and upon due proof of any of the facts in the last section required to authorize the issuing of the same."⁴

12. Whenever any action shall be commenced, or any application made against any corporation, its directors, or other superintending officers, or its stockholders, according to the provisions of this title, the court may, by injunction, on the application of either party, and at any

¹ *Conro v. Port Henry Iron Co.*,
12 Barb., 27.

² *Bradt v. Benedict*, 17 N. Y. R.,
98.

³ 3 R. S. (5th ed.), 764, § 47.

⁴ *Ib.*, § 48.

stage of the proceedings, restrain all proceedings at law, by any creditor, against the defendants in such suit; and whenever it shall appear necessary, or proper, may order notice to be published in such manner as the court shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the suit within a reasonable time, not less than six months from the first publication of such order, and in default thereof, to be precluded from all benefit of the decree which shall be made in such suit and from any distribution which shall be made under such decree.¹

13. The manner in which creditors of a corporation are to make themselves parties to a suit commenced against the corporation to wind up its affairs, must be substantially the same as that in which creditors of a deceased individual make themselves parties to a suit for the settlement of his debts and credits, by coming in before a master under a decree and proving the debts.²

14. Where the directors of a corporation do any act which works a forfeiture of the charter of the company, it is such a violation of the law incorporating the company as to authorize a creditor, or a stockholder of the corporation to institute proceedings against it, for the purpose of having a receiver appointed to close up the concern of the company, under the provision of the statute above cited.³ Thus, the intentional neglect on the part of the officers of a corporation to notify and hold the annual election for directors as required by the act of incorporation, is such a violation of the provisions of the charter as will authorize the court to appoint a receiver and to decree a dissolution of the corporation.⁴ But, where it is proved that an insurance company is insolvent, the court is not

¹ 3 R. S. (5th ed.), 767, § 65.

² Judson v. Rossie Galena Co., 9 Paige, 598.

³ Ward v. Sea Ins. Co., 7 Paige,

⁴ Id.

bound, as of course, to issue an injunction, but must use its discretion and take such course, as will inure to the benefit of all concerned.

15. There are certain other provisions in the revised statutes relating to moneyed corporations, by which term is meant every corporation having banking powers, or having the power to make loans upon pledges or deposits, or authorized by law to make insurances; ¹ and the provision is made applicable to every moneyed corporation created, or whose charter shall be renewed or extended after the first day of January, one thousand eight hundred and twenty-eight, unless such corporation shall be expressly exempted from the provisions of that title, in the act creating, renewing or extending such corporations. ²

16. By such statute it is declared to be unlawful for the directors of any moneyed corporation, among other things, to make dividends, except from the surplus profits arising from the business of the corporation; or to divide, withdraw, or in any manner pay to the stockholders or any of them, any part of the capital stock of the corporation, or reduce such capital stock without the consent of the legislature; ³ and no conveyance, assignment or transfer, not authorized by a previous resolution of its board of directors shall be made by any such corporation of any of its real estate, or any of its effects, exceeding the value of one thousand dollars; but this section shall not apply to the issuing of promissory notes, or other evidences of debt, by the officers of the company in the transaction of its ordinary business, nor to payments in specie or other current money, or in bank bills made by such officers; nor shall it be construed to render void any conveyance, assignment or transfer, in the hands of a purchaser for a valuable consideration, and

¹ 2 R. S. (5th ed.), 526, § 54.

² *Ib.*, § 55.

³ 2 R. S. (5th ed.), 517, § 1, subs 1, 2.

without notice.¹ No such conveyance, assignment or transfer, nor any payment made, judgment suffered, lien created, or security given by any such corporation when insolvent, or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the company, shall be valid in law; and every person receiving by means of any such conveyance, assignment, transfer, lien, security or payment, any of the effects of the corporation, shall be bound to account therefor to its creditors or stockholders, or their trustees, as the case shall require.²

17. The provisions of the eighth section, cited above, extend only to such moneyed corporations as are, *by their charter*, subject to the management of a board of directors, trustees or other officers.³ Payment and transfer of property made by a moneyed corporation, when actually, though not avowedly, insolvent, or in contemplation of insolvency, which actually occurs, with intent to give preference to creditors, are void within the ninth section of the act cited above, even though knowledge of the pecuniary condition of the company be not brought home to the party receiving the transfer and payments.⁴

18. When an insolvent corporation was suffering creditors of a certain class to obtain large judgments, with a view to give them preference, an injunction was granted at the suit of a creditor at large, restraining the creditors so proceeding to judgment from further proceedings, except to enter judgment as security.⁵ So, an assignment after a judgment recovered, of all the real and personal property of a manufacturing company, in trust, to pay all creditors ratably, was held void as having been made in contemplation of insolvency.⁶

¹ 2 R. S. (5th ed.), 519, § 8.

² 2 R. S. (5th ed.), 519, § 9.

³ *Gillett v. Campbell*, 1 Denio, 520; *Matter Bank of Dansville*, 6 Hill, 370.

⁴ *Brouwer v. Harbeck*, 9 N. Y. R., 589.

⁵ *Galway v. U. S. Steam Sugar Ref. Co.*, 13 Abb., 211; 21 How., 318.

⁶ *Harris v. Thompson*, 15 Barb., 62.

19. There has been some question whether the provisions of the revised statutes relating to the insolvency of moneyed corporations (part of which is cited above), are applicable to associations formed under the general banking act of 1838; but it seems, at length, to be decided that banks formed under that act are not subject to the provisions relating to moneyed corporations; but that, being of the nature of corporations, they are subject to the general act as to proceedings in equity against corporations.¹

20. While a corporation employs its powers and funds for purposes within the scope of its charter, the will of a majority, properly expressed at a legal meeting, must control; but it is otherwise when such powers and funds are employed for any purpose not contemplated by the charter.² Thus, where four out of seven trustees and directors of a manufacturing corporation sold all the property of the corporation, except the real estate, and transferred the whole business to the purchaser, without the consent and against the wishes of the other trustees and corporators, the sale and transfer were held to be without power, and a violation of the trust and confidence reposed in the trustees and directors, and an injunction was granted.³ So, where the money which should have been divided among the stockholders was applied contrary to the charter or articles of agreement, it was held a breach of trust and a fraud on the part of the majority towards the minority, who may have remedy by injunction.⁴

¹ See *Leavitt v. Blatchford*, 17 N. Y. R., 521; *Curtis v. Leavitt*, 15 N. Y. R., 180; *International Bank v. Bradley*, 19 N. Y. R., 245; *Robinson v. Bank of Attica*, 21 N. Y. R., 406.

² *Gifford v. New Jersey, etc.*, 2 Stockt., 171.

³ *Abbott v. American Hard Rubber Co.*, 20 How., 199; 21 How., 193; 11 Abbott, 204.

⁴ *March v. Eastern, etc.*, 43 N. H., 515.

21. So, where a stock corporation had fraudulently issued false certificates of stock, largely beyond the actual capital of the company, and the corporation had become insolvent, an injunction was granted restraining the company and its officers from opening their transfer books for the transfer of stocks, even for owners who were stockbrokers, and required such transfer to be made in the regular course of business.¹

22. The payment of a dividend, by a moneyed corporation, may be restrained by injunction at the suit of a stockholder, where no dividend has been earned, and the directors are about to misapply the funds of the corporation in payment thereof; but after the dividend has been declared, the right of each shareholder in the dividend coming to him is separate and independent of that coming to other shareholders, and he cannot file a bill in behalf of such others to restrain the payment of such dividend.² So, where a dividend had been declared by the directors of a corporation, an injunction was granted on the ground that among the persons designated as stockholders were several holding false stock, which had been fraudulently issued, and the corporation was restrained from paying such dividend, or from declaring other dividends, until the true list of stockholders had been ascertained.³

23. On an application of the attorney general for an injunction against a banking corporation, to restrain a violation of law, it is not necessary to show any specific injury. In a suit by the people, the public wrong arising from a violation of law implies an injury during its continuance.⁴

¹ *People v. Parker Vein Coal Co.*, 10 How., 186.

² *Carpenter v. N. Y. & New Haven R. R. Co.*, 5 Abb., 277.

³ *Underwood v. N. Y. & New Haven R. R. Co.*, 17 How., 538.

⁴ *People v. Metropolitan Bank*, 7 How., 144.

24. Again, it is provided among other things by the act of 1849, that upon the return of an execution against the property of any corporation or joint stock association for banking purposes, issuing bank notes or any kind of paper credits to circulate as money, after the first day of January, one thousand eight hundred and fifty, unsatisfied in whole or in part, or upon proof satisfactory to any justice of the supreme court, that any such execution, although not returned, cannot be satisfied out of any property of the defendant, he shall at once make an order declaring the insolvency of such corporation or association.¹ Any creditor of any such corporation or association having a demand exceeding one hundred dollars arising upon a debt or liability contracted after the first day of January next (1850), the payment of which shall have been refused by such corporation or association, may, at any time after ten days from the time of such refusal, apply to a justice of the supreme court for an order declaring such corporation or association insolvent and for an injunction as hereinafter provided. If, in the opinion of such judge, upon the facts presented, it be expedient, in order to prevent fraud or injustice, he may grant an order for a temporary injunction, restraining such corporation or association and its officers from paying out or in any way transferring or delivering to any person, any money or assets of such corporation or association, or incurring any debt or obligation, until such order be vacated or modified.²

*25. Upon a hearing of the parties on such short notice as the judge shall appoint, he shall determine whether such corporation or association be clearly solvent or otherwise, and may require the officers thereof to exhibit any and all of its books, papers, accounts, assets and effects, and to be examined on oath touching the same

¹Session Laws 1849, ch. 226, § 6.

²Id., § 7.

before him, or a referee to be appointed by him. If he determine that such corporation or association is clearly solvent, he shall, notwithstanding, continue the order for a temporary injunction, if one has been granted, until the demand of the applicant be fully paid with his costs on such application; unless it shall have appeared by affidavit or otherwise that such corporation or association have a good defense on the merits to such demand.¹

26. If the judge determine that such corporation or association is not clearly solvent, he shall make an order declaring the same insolvent, and shall also by order restrain such corporation or association and its officers from exercising any of its corporate rights, or any rights or privileges granted to it by law, and from collecting or receiving any debts or demands and from paying out or in any way transferring or delivering to any person any of its property, money or effects, until such order be vacated; and he shall immediately appoint a receiver of the property of such corporation or association.²

27. Any one or more stockholders of any such corporation or association owning stocks to the amount of one-tenth part of the capital thereof paid in, may at any time, in like manner, apply to any justice of the supreme court for an order declaring such corporation or association insolvent, or in imminent danger of insolvency. And if on the facts verified by affidavit presented, such justice shall deem it necessary or expedient in order to prevent fraud, undue preference or injustice to creditors, he may grant an order in the nature of a temporary injunction, as specified in the seventh section of this act. Upon a hearing of the parties as soon as may be practicable, he may require the exhibition to him, or to a referee to be appointed by him, of all the books, papers, accounts, assets

¹ Session Laws 1849, ch. 226, § 8.

² Id., § 9.

and effects of such corporation or association; and on examination of the officers, servants and agents thereof under oath; and if he determine that such corporation or association is not clearly solvent, or that it is in imminent danger of insolvency, he shall make an order declaring such determination, and shall by order restrain the said corporation or association and its officers, in the same manner as provided in the ninth section of this act, and shall also appoint a receiver of the property of such corporation or association.¹

28. Within the meaning of the above act, a bank is clearly solvent, and consequently not to be proceeded against as insolvent, if it has property more than sufficient to satisfy all demands against it. Nor is the mere fact, of suspension of specie payment by a bank of circulation, proof of insolvency, when it appears that specie payment has been almost universally suspended among banks in general. In such a case, where no fraud or injustice is alleged, the court will not deem it expedient to grant a temporary injunction, or an order to show cause why an injunction should not be issued; although the bank refuse to redeem its circulation.² Nor is an affidavit, stating "upon information and belief" that a bank is insolvent, sufficient evidence to authorize the granting of an injunction and the appointment of a receiver, especially when it is in direct contradiction to the regular official reports of the bank made under oath.³

29. A clear violation of law, or a clear misuse or abuse of its corporate powers, by a municipal corporation, is an appropriate ground for an injunction, especially where the threatened act is one of serious consequence to the public; and, though a court of equity has no right to interfere

¹ Session Laws 1849, ch. 226, § 10.

³ *Livingston v. Bank of N. Y.*, 26

² *Livingston v. Bank of N. Y.*, 26 Barb., 304.

with, or control the exercise of a discretionary power, by substituting its own judgment for that of the party in whom the discretion is vested ; yet it is bound to interfere, where ever it has ground for believing that its interference is necessary to prevent abuse, injustice or oppression, the violation of a trust, or the consummation of a fraud.¹

30. But a court of equity will not ordinarily enjoin the passage of an ordinance or resolution by a municipal corporation, that being an act of legislation, but will confine itself to enjoining any act towards carrying such resolution or ordinance into effect. Yet, if it be shown that the mere voting on, and formal passage of the proposed resolution or ordinance would instantly, without any action or attempt to enforce any right or privilege under it, work an irremediable private injury, such voting and passage may be restrained.² A legislative act cannot be enjoined ; as for instance, an order of a city common council to a department to give an individual a particular contract, but the execution of such order may be restrained.³ But the granting of a right of way to a street rail road, by a city corporation, is not an act of legislation, but a grant upon conditions and may be enjoined.⁴

31. The corporate authorities of the city of New York have no power to confer upon individuals, by contract for an indefinite period, the franchise of constructing and operating a rail road in the public streets for their private advantage. The power in respect to the control and regulation of streets, is held in trust for the public benefit, and cannot be delegated to private individuals ; so that a resolution of the common council authorizing private persons to construct and operate a rail road upon certain

¹ Davis v. Mayor of N. Y., 1 Duer, 451 ; People v. Sturtevant, 9 N. Y. R., 283.

² Whitney v. Mayor, etc., 28 Barb., 283.

³ People v. New York, 32 Barb., 35.

⁴ People v. Sturtevant, 9 N. Y. R., 268.

conditions, without limitation as to time, or reserving a power of revocation, is void, because it would deprive the corporation of the power to control and regulate the use of the streets.¹ Nor can the common council of the city of New York authorize the extension of a rail road in that city, irrespective of any legislative grant, except, perhaps, when it may be necessary to the enjoyment of the principal legal grant.²

32. So the common council cannot dispose of an easement in a street, without reference to the interest of the corporators, and where a common council grants a privilege to lay a rail road in a street, to individuals for a trifling consideration, when large payments could have been obtained, they are guilty of a breach of trust, and the court will grant an injunction to restrain such privilege from being carried into effect.³ But the franchise of laying gas pipe in a street, is not a part of the city property, within the principle that an illegal disposition of the private property of the city, may justify an injunction.⁴

33. The court will not review the propriety of a resolution to pay money out of the treasury for some purpose. To sustain an injunction, it must appear that the appropriation was beyond the power of the corporate authorities by whom it was passed.⁵ Thus, an injunction will not be granted, at the suit of a tax-payer, to enjoin an appropriation of funds to pay for the portrait of the governor, under a power conferred on a municipal corporation to furnish a room for the common council.⁶ But where the city of New London appropriated money for the celebra-

¹ *Milhau v. Sharp*, 27 N. Y. R., 611.

² *People v. Third Avenue R.R. Co.*, 80 How., 121.

³ *Milhau v. Sharp*, 15 Barb., 198; *Stuyvesant v. Pearsall*, id., 244.

⁴ *Smith v. Metropolitan Gas Co.*, 12 How., 187.

⁵ *Roberts v. Mayor, etc., of N. Y.*, 5 Abb., 41.

⁶ *Reynolds v. Mayor, etc., of Albany*, 8 Barb., 597.

tion of the anniversary of independence, a bill was sustained on behalf of certain tax-payers to restrain the payment of such appropriation. The court remarked: "The city corporation was in the nature of a trustee of the money in its treasury, for the corporators, the inhabitants of the city, for the purposes for which they were incorporated, and here was a meditated misappropriation of the trust fund; and, secondly, it is extremely doubtful, whether the plaintiffs could have any other remedy. The amount appropriated by this vote, was in the city treasury, and, if abstracted, must, when wanted for other and legitimate purposes, be supplied by a tax on the inhabitants. It is suggested that the plaintiffs should bring an action against the city, for a misappropriation of its funds, or that, when such tax is laid, they should, by a proper action, resist its collection. We are by no means prepared to say, that an action could be maintained on either of these grounds, and are strongly inclined to think it could not. But, however this may be, we are clearly of opinion, that the plaintiffs are not bound to wait until the money is misspent, nor until such tax shall be levied, and attempted to be collected, but that they may call on a court of equity to interpose, by way of preventing the injury." ¹

34. The court can enjoin a corporation, as well as a private individual, from so using their property as to wrongfully interfere with the enjoyment of their estates by adjacent proprietors.² So, a corporation may be restrained from pulling down the plaintiff's dam under an illegal claim of right to abate it as a nuisance.³ So, the court may enjoin the enforcement of an illegal ordinance against the plaintiff, under which he is imprisoned and his busi-

¹ *New London v. Brainard*, 22 Conn., 552.

² *Brower v. Mayor, etc., of N. Y.*, 3 Barb., 254.

³ *Clark v. Mayor, etc., of Syracuse*, 13 Barb., 32.

ness injured.¹ So, a municipal corporation may be enjoined from taking lands under an award of commissioners, whenever the proceedings in the subordinate tribunal will necessarily lead to a multiplicity of actions; or where their execution would cause irreparable injury to the freehold.² But a corporation should not be restrained from disposing of a ferry privilege, on the mere ground that it proposes to allow its lessee to charge too high fare. The remedy for such over charge is with the legislature.³

35. Assessments are not the subject of equitable relief except in special cases, as where they assert a lien on real property and the defect is not apparent on the face of the proceeding; or, perhaps, where, in case of personal property, the enforcement is shown to be an irreparable injury or to cause a multiplicity of actions.⁴ And the collection of an assessment imposed for a street improvement, will not be enjoined when the corporation has authority to make such improvement.⁵

36. But as a general rule, only the people can maintain an action to restrain the violation of a public trust. To enable corporators and tax-payers to have an injunction they must have sustained some private or individual injury. No private person or number of persons can assume to be the champions of the community, and, on its behalf, challenge the public officers to meet them in the courts of justice, to defend their official acts.⁶

37. An injunction cannot be granted to restrain individuals, claiming to be legally elected trustees in a religious corporation, from acting as such. The remedy is by an action in the nature of a *quo warranto*.⁷ Nor will the trus-

¹ Wood v. City of Brooklyn, 14 Barb., 425.

² Baldwin v. City of Buffalo, 29 Barb., 396.

³ People v. Mayor of N. Y., 32 Barb., 102.

⁴ Von Beck v. Village of Rondout, 15 Abb., 48.

⁵ Merrill v. Mayor of Brooklyn, 8 Edw., 421.

⁶ Ketchum v. City of Buffalo, 14 N. Y., 356; Doolittle v. Supervisors, etc., 18 N. Y., 155.

⁷ Hart v. Harvey, 32 Barb., 55; 19 How., 245.

tees of a church be restrained, at the suit of pew holders, from removing their pews and erecting slips or other structures in their place. The interest of pew owners consists only in the right to occupy their respective pews as part of the auditory, on occasions of public worship, and they hold with all the conditions incident to such property.¹

38. An order which restrains a corporation from doing an act, restrains every officer or member of such corporation from doing such act, and this, notwithstanding the order is directed to the corporate body by its corporate name.²

39. Although a corporation cannot be attached for contempt of an injunction order, as in the case of a natural person, yet, it may be punished for a disobedience of the order by a fine or the sequestration of its property.³

¹ *Wheaton v. Gates*, 18 N. Y., 404; *Cooper v. Trustees of First Presbyterian Church of Sandy Hill*, 32 Barb., 222.

² *Davis v. Mayor of N. Y.*, 1 Duer, 451; see 5 Seld., 263.

³ *People v. Albany & Vt. R.R. Co.*, 20 How., 358; see, however, *Davis v. Mayor, etc.*, 1 Duer, 484.

SECTION XV.

PARTNERS, PUBLIC OFFICERS AND OTHER PARTIES.

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| <ol style="list-style-type: none"> 1. Partnership, when may be enjoined. 2. When granted, on application of one partner. 3. Must make case for dissolution. 4. Particular acts of misconduct. 5. Misapplication of property. 6. Giving partnership security for individual debts. 7. Staying execution against partnership property for individual debt. 8. Miscellaneous cases where allowed. 9. Injunctions against an agent. 10. Enjoining executors, assignees and trustees. 11. Seldom granted against executors. 12. Rule as to executors and administrators. | <ol style="list-style-type: none"> 13. Receivers. 14. Restraining attorneys from divulging privileged communications. 15. Husband and wife. 16. Public officers. 17. Cannot be granted to restrain assuming office. 18. Nor to aid in trying title to office. 19. Restraining payment of salaries pending suit to test title. 20. Officers having discretionary power cannot be enjoined. 21. Police officers. 22. State officers how enjoined. 23. Effect of injunctions against public officers by their individual names. |
|---|---|

1. Partnership is a relation which in various ways calls for the action of a court of equity ; as, for the purposes of discovery, account, specific performance and dissolution, and in connection with some or all of these main objects, and, in some instances, without reference to any ulterior end, partnerships are made the subject of injunction.¹ And it may be stated, as a general rule, that positive misconduct of a partner in reference to the partnership business, is ground for an injunction, more especially in connection with a prayer for other relief. But courts of equity in interfering by way of injunction in cases of partnership act upon a sound discretion, and will not interfere to restrain any breach or dereliction of duty, unless they are of such a nature as may produce permanent injury to

¹ Hill. on Inj., 356.

the partnership, or involve it in serious perils or mischiefs in future. A mere fugitive temporary breach, involving no serious evils or mischiefs, and not endangering the future success and operations of the partnership, will, therefore, not constitute any case for equitable relief. Equity will not interfere in cases of frivolous vexation, or for mere differences of temper, casual disputes, or other minor grievances, especially where the partnership is limited as to time.¹

2. An injunction may be granted on the application of one partner in a dissolved firm, to restrain the other partner from interfering with the partnership property, and a receiver may be appointed to take charge of the same; but this can only be done when a dissolution is shown, or a state of facts sufficient to justify a decree of dissolution.²

3. It is a general rule that equity will not interfere by injunction, or grant a receiver, unless the plaintiff ask and make a case for a dissolution.³ But particular acts of misconduct on the part of the partners may be enjoined, although a dissolution be not prayed for. Thus, a partner may be restrained from destroying property.⁴ So, it is said, "Equity will in case of a partnership, existing during the pleasure of the parties, with no time fixed for its renunciation, interfere (as it should seem) to qualify or restrain that renunciation, unless it is done under fair and reasonable circumstances; for if a sudden dissolution is about to be made, in ill faith, and will work irreparable injury, courts of equity will, upon their ordinary jurisdiction to prevent irreparable mischief, grant an injunction against such a dissolution."⁵

4. The court has jurisdiction to prevent one partner

¹ Story Partn., 328-31; Henn v. Walsh, 2 Edw. Ch., 129.

² Smith v. Jeyes, 4 Beav., 503; see Jackson v. DeForest, 14 How., 81; Law v. Ford, 2 Paige, 310.

³ Waters v. Taylor, 15 Vesey, 10; Smith v. Jeyes, 4 Beav., 503; Jackson v. DeForest, 14 How., 81.

⁴ Miles v. Thomas, 9 Sim., 609.

⁵ 1 Story Eq., 686, § 668.

from excluding another from, or from so acting as to prevent the continuance of the partnership according to its terms. If two parties agree to devote their whole time to a partnership concern, the court will not permit one of them to exclude the other from the partnership, or to set up a separate business which makes it impossible that he should perform his partnership obligation. Though the court cannot compel, by injunction, a specific performance of the agreement, yet it can restrain the carrying on of a separate business with any other person.¹ So, covenants in the articles of partnership, to the effect that neither party will carry on any business within one block of the premises occupied by the firm, within a certain limited period after the dissolution of the partnership, will be enforced by injunction.² So, where one firm has sold out to another, and agreed with them not to resume the same business in the same place, and afterwards do so resume, a mere prayer for an injunction will be granted on the application of a single member of the injured firm, the injunction being equally for the benefit of his partners, though it would be otherwise where damages are sought.³

5. So, where on a dissolution of partnership, between A and B, it was agreed that A should take the property, pay all of the debts, and indemnify B against them, an injunction was granted to prevent the misapplication of the property by A.⁴

6. There is one case constantly occurring where the court will interfere, namely, that of a partner receiving money for his private use on the credit of the partnership firm; but the court only interferes in such cases, because there is ground for dissolving the partnership.⁵ Thus, where a partner gave his individual creditor a partnership

¹ *Kemble v. Kean*, 6 Sim., 333.

² *Shearman v. Hart*, 14 Abb., 358.

³ *Beard v. Dennis*, 6 Ind., 200.

⁴ *Deveau v. Fowler*, 2 Paige, 400.

⁵ *Marshall v. Colman*, 2 Jac. & M. 266; see 3 Kent, 61.

security, made and given without the knowledge or consent of the other partners, the creditor having knowledge of the fact, an injunction was granted restraining the partner from drawing or accepting bills in the name of the firm, and restraining the holders from negotiating the bills taken by them.¹ So, more especially, a partner who has become insolvent, or who has involved the firm, will be enjoined from drawing, indorsing, and accepting bills in the firm name, and from receiving the partnership debts.²

7. Although partnership assets should go to pay partnership debts, in preference to the individual debts of the partners, yet an injunction will not be granted to stay an execution against the partnership property for the individual debt of one of the partners. The remedy by the partner injured is to proceed against the purchaser at the sheriff's sale, to ascertain what interest, after the payment of the partnership liabilities, and protection of the rights of the other partners, such purchaser acquired.³

8. An injunction, without a receiver, was allowed against a surviving partner, being insolvent, on the application of the deceased partner's representatives.⁴ So, an injunction was granted to restrain one partner, who had removed the partnership books from the counting house, in violation of a covenant, from continuing to retain them.⁵ So, after dissolution, equity will restrain one partner from publishing the letters of another relating to the joint business, unless demanded by civil or criminal justice.⁶ So, after a firm has been dissolved, one of its members using the name in a manner calculated to deceive,

¹ Hood v. Aston, 1 Russell, 415.

² Williams v. Bingley, 2 Vern., 278, Raithsby's note.

³ Moody v. Payne, 2 John, Ch., 548; Phillips v. Cook, 24 Wend., 389; Hergman v. Dettleback, 11 How.,

46; Mowbray v. Lawrence, 13 Abb., 317; 22 How., 107.

⁴ Hart v. Schrader, 8 Vesey, 317.

⁵ Taylor v. Davis, 3 Beav., 387, note *a*.

⁶ Roberts v. M'Kee, 29 Geo., 161.

may be enjoined.¹ So, a surviving partner may enjoin the executors of a deceased partner from using the partnership name in carrying on the business.²

9. As a general rule, an injunction will not be granted against an agent where the principal is not made a party.³

10. Injunctions will sometimes be granted to restrain executors, assignees and trustees from further interfering with an estate which they have mismanaged, or put in jeopardy by insolvency, either existing or pending.⁴ But the prayer for an injunction must be accompanied by a prayer for a receiver, or the relief will not be granted.⁵

11. But the occasion for equitable interference, since the revised statutes, will not occur so frequently as formerly. Since non-resident executors are required to give bonds before entering upon their trust, and also since it is provided that, if an executor becomes incompetent by law to serve, or if his circumstances are so precarious as not to afford adequate security, or he has removed, or is about to remove, from the state, the surrogate is empowered, on the application of any one interested in the estate, to require from such executor a bond like that required of administrators.⁶

12. On a bill by a creditor, alleging that the testator devised his estate for payment of debts, and that the executor refused to distribute the assets, and threatened to secure favorite creditors, an injunction was allowed against the executors.⁷ Where a temporary injunction had been granted, and a perpetual injunction was prayed for, against executors who had failed to file an inventory of personal property, and were wasting the estate, an

¹ Peterson v. Humphrey, 4 Abb., 394.

² Lewis v. Landor, 7 Sim., 421.

³ Boyd v. Vanderkemp, 1 Barb. Ch., 273.

⁴ Elmendorf v. Lansing, 4 John. Ch., 563.

⁵ Boyd v. Murray, 3 John. Ch., 48.

⁶ Will. Eq., 368; 2 R. S., 70, § 7; Id., 72, §§ 18, 19, 20.

⁷ Depau v. Moses, 3 John. Ch., 349.

injunction was refused, as it appeared that the surrogate had compelled them to give security until the inventory should be filed.¹ So, where an administrator had failed to plead, in an action against him, under advice that his plea would not avail, he was granted an injunction against judgment on default, as from the nature of his office he was obliged to rely on information.²

13. A receiver, being an officer of the court, cannot be sued without its permission, and an injunction against him is not proper. The mode of restraining such an officer, when engaged in the discharge of his official trust, is by application to the court for instructions, and not by injunction.³ When a receiver is authorized to sue, he is bound to proceed, and can not be restrained by injunction out of another court.⁴

14. Where an attorney, solicitor or counsellor is professionally employed, any communication made to him by his client with reference to the subject or object of such employment, is under the seal of professional confidence, and is a privileged communication ;⁵ and the fact that the relation has ceased makes no difference ; the mouth of the attorney is shut forever.⁶ So, all documents and papers which have come into the attorney's hands by reason of his relation to his client, fall within the same rule.⁷

15. In an action by a wife against her husband for a decree of separation from bed and board, and for support, it appearing that the husband was about disposing of his property and removing with the proceeds from the state, an injunction was granted restraining such disposition and removal until after trial and judgment ;⁸ and it is held that in such cases it is no objection to granting an injunction

¹ Whitney v. Munro, 4 Edw. Ch., 5.

² Hewlett v. Hewlett, 4 Edw. Ch., 7.

³ Van Rensselaer v. Emery, 9 How., 135 ; DeGroot v. Jay, 9 Abb., 364.

⁴ Winfield v. Bacon, 24 Barb., 154.

⁵ Bank of Utica v. Mersereau, 3 Barb. Ch., 528, 595.

⁶ Wilson v. Rastall, 4 T. R., 759.

⁷ March v. Ludlum, 3 Sandf., Ch. 35.

⁸ Vermilyea v. Vermilyea, 14 How., 470.

that no part of the relief sought is a perpetual injunction.¹ In a suit for separation of husband and wife, it appears that, in case of necessity, the court will grant an injunction, *ex parte*, restraining the husband from carrying the children out of the jurisdiction of the court.² So, in case of gross drunkenness and blasphemy, the father's right to the control of his children is subordinate to the power of the court to take his child from him.³

16. A court of equity has undoubted jurisdiction to interfere by injunction where *public officers* are proceeding illegally and improperly, under a claim of right, to do any act to the injury of the rights of others.⁴ The limits within which the court interferes with the acts of public officers are perfectly clear and unambiguous. So long as such officers confine themselves strictly within the exercise of those duties confided to them by law, the court will not interfere; but if they are departing from that power which the law has vested in them — if they are assuming to themselves a power over property which the law does not give them — they are no longer considered as acting under the authority of their commissions, but are treated as persons dealing with property without legal authority.⁵

17. Where an action in the nature of *quo warranto* is brought to test the title of the defendant to hold and exercise an office, a preliminary injunction, restraining the defendant, pending the suit, from exercising the office, cannot be granted. The public interests forbid that the discharge of the duties of the officers should be suspended. The title to the office must be determined in favor of the plaintiff, before he can have an injunction.⁶ Thus a court

¹ *Rose v. Rose*, 11 Paige, 166.

² *Laurie v. Laurie*, 9 Paige, 234; 513.

DeManneville v. DeManneville, 10 Ves., 64.

³ *Id.*

⁴ *Conover v. Mayor, etc.*, 25 Barb.,

⁵ *Green v. Mumford*, 5 R. I., 475.

⁶ *People v. Draper*, 24 Barb., 265; 14 How., 233; *People v. Sampson*, 25 Barb., 254.

of chancery has no jurisdiction to enjoin a flour inspector, who entered upon the duties of his office, under cover of an appointment by the governor, made, during a recess of the senate, or to appoint a receiver of the fees or emoluments of the office, until the rights of the former inspector, who claims to hold over, and of the defendant, can be determined at law, although the latter is insolvent.¹

18. Nor can the question of title to a public office be indirectly tried in an injunction suit brought to restrain the defendant from taking possession of the books and papers appertaining to such office.²

19. When an action was pending between two claimants of an office to test the title, and one of the claimants had brought an action against the plaintiffs — a corporation — for salaries, it was held to be a proper case for an injunction restraining the comptroller of such corporation from allowing or paying any such claim and the other defendant from proceeding in such action for salaries, until the termination of the *quo warranto*.³

20. Where the law gives to officers a power which implies and requires the exercise of a sound judgment and discretion, the correction of their errors belongs to the supreme court as a matter of legal, and not of equitable cognizance, and an injunction will not be proper.⁴ An injunction cannot be granted to restrain commissioners of excise from granting licenses to sell intoxicating liquors. The legislature has granted them a discretion, and the court has no authority to interfere with, or control that discretion, provided it is exercised in good faith.⁵ So, an action will not lie to set aside the proceedings of

¹ Tappan v. Gray, 9 Paige, 507; 7 Hill, 259.

² Mayor, etc., v. Conover, 5 Abb., 171; see, however, *id.*, p. 252.

³ Mayor, etc., v. Flagg, 6 Abb., 296.

⁴ Woodruff v. Fisher, 17 Barb., 224; Wilson v. Mayor, etc., 4 E. D. Smith, 675; 1 Abb., 4; Gillespie v. Broas, 23 Barb., 370.

⁵ Leigh v. Westervelt, 2 Duer, 618.

highway commissioners, or to restrain them from carrying out an order made by them, removing an incroachment, whether on the ground that they had not jurisdiction, or that their decision was unjust or irregular. The remedy in such cases is by *certiorari*.¹ So, erroneous or illegal assessments made by assessors, may be reviewed by the court on *certiorari*, and set aside. But the general rule is that a court of equity will not entertain an action by the party aggrieved for relief against such an assessment.² So, an injunction will not be allowed for the purpose of restraining a judicial officer from transcending his jurisdiction; the proper remedy in such case is by a writ of prohibition.³ So, when public officers are authorized by law, to issue bonds, an injunction will not be granted to restrain them from so doing, upon the ground of a mere apprehension that the officer who is designated to receive them will misapply the proceeds.⁴

21. So an injunction will not be granted to restrain police officers from exercising supervision over citizens, within the line of their duty as officers of the peace, although the performance of the supervision may be in an arbitrary and unlawful manner. A proper remedy may be had either by an action for damages, or by a criminal prosecution.⁵

22. Injunctions to restrain state officers, or board of officers, or persons employed by them, from executing any duty devolved upon them by law, can be granted only by the supreme court, sitting in general term in the district in which such board is located, or such duty required to be performed.⁶ And a notice of at least eight days must be given of the time and place of such application.⁷

¹ Hyatt v. Bates, 35 Barb., 308.

² Heywood v. City of Buffalo, 14 N. Y. R., 534; Wilson v. Mayor, etc., 4 E. D. Smith, 675, and cases cited.

³ Ward v. Kelsey, 14 Abb., 106.

⁴ Faulkner v. Metcalf, 43 Barb., 255, note.

⁵ Sterman v. Kennedy, 15 Abb., 201.

⁶ Laws 1851, chap. 488.

⁷ Id.

Some difference of opinion seems to exist as to whether a court can enjoin state officers from proceeding under a statute which the court deems to be unconstitutional. It was held in *Thompson v. Commissioners of Canal Fund*¹ that an injunction could not be granted in such case, but in *Hartwell v. Armstrong*,² it was held otherwise, and the law of 1851, above cited, would seem clearly to indicate that such injunction may be issued.

23. An injunction issued against public officers, sued by their individual names will not bind their successors in office nor the public.³

¹ 2 Abb., 251; and see *People v. Draper*, 14 How., 233.

² 19 Barb., 175; see also *Holt v. Com. of Excise*, 31 How., 331, note.

³ *Magee v. Cutler*, 43 Barb., 239.

SECTION XVI.

RESTRAINING ACTS PENDING LITIGATION.

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| <ol style="list-style-type: none"> 1. Second clause of § 219, restraining acts in violation of plaintiff's rights. 2. When granted under clause second. 3. In an action of claim and delivery. 4. Clause third, restraining disposition of property. | <ol style="list-style-type: none"> 5. Object of the provision. 6. What the plaintiff must show. 7. Not applicable after act has been done. 8. Fraudulent intent must be shown. 9. Effect of injunction under third clause. 10. What plaintiff's affidavits must contain. |
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1. The second clause of the section under consideration provides for an injunction not immediately arising out of the controversy to be decided, but subsidiary in its nature, restraining the defendant from doing some act in violation of the plaintiff's rights respecting the subject matter of the action. Its language is that "when during the litigation, it shall appear, that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act."¹

2. This clause relates to some right respecting the *subject of the action*, and is applicable to causes where there is danger that the subject of the action may be injured or destroyed; as where a mortgagee is foreclosing his mortgage upon premises that are, or may be inadequate security, unless the mortgagor or occupant of the premises be restrained, during the pendency of the litigation, from committing waste.² The act to be prevented must tend to render the judgment which the plaintiff is seeking to

¹ Section 219, clause 2.

² Brooks v. Stone, 19 How., 895.

obtain ineffectual; and it is possible that the necessity for an injunction should arise *during* litigation.¹

3. Where, in an action of claim and delivery the personal property has been redelivered to the defendant, by the sheriff, under section 211 of the Code, the plaintiff may have an injunction restraining the defendant from injuring or disposing of the property.² But no injunction can be issued to restrain the defendant in such action from giving the prescribed security and obtaining a redelivery of the property to him as provided under section 211.³

4. The last clause of section 219 provides for injunctions, extraneous to the subject matter of the suit between the parties, and restraining the defendant from making a fraudulent removal or disposition of his property, "where during the pendency of an action, it shall appear by affidavit that the defendant threatens or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted, to restrain such removal or disposition."

5. The object of this provision is manifest from the terms used and the connection in which it stands. It is simply to provide for the single case where, pending a suit in which judgment is about to be recovered, the defendant threatens, or in some way manifests an intention, to place his property beyond the reach of an execution. If the fraud has been already perpetrated the creditor is left to other remedies. But when, by interposing temporarily to prevent the consummation of the fraudulent act, the necessity for protracted litigation to establish or subvert the fraud, can be saved, it is deemed expedient by the legislature to confer upon the court this power.⁴

¹ Hovey v. McCrea, 4 How., 31; see Furniss v. Brown, 8 How., 63; Malcolm v. Miller, 6 How., 456. Erpstein v. Berg, 13 How., 92.

² Hunt v. Mootry, 10 How., 478; ³ Id.

⁴ Reubens v. Joel, 13 N. Y. R., 488.

6. The plaintiff, to avail himself of the remedy herein provided, must show, not that the defendant *has* made, but that he threatens, or is about to make, a fraudulent transfer of his property; and, although this be made to appear, yet, if the justice of the claim for which the suit is brought is involved in serious doubt, the court, in the exercise of a sound discretion, and in view of the well settled principles which have always governed the exercise of this extraordinary power, should undoubtedly refuse to interfere.¹

7. This remedy, as given by the third clause, is only applicable when the act is threatened, or is about to be done, and not when it is done. It is preventive merely.² So, it seems that it must appear that the *threat* of defendant to remove or dispose of property, etc., were made *during* the pendency of the action; otherwise the complaint should contain a prayer for an injunction for that reason.³

8. A mere refusal to pay a debt is not sufficient to justify an injunction, not even if the defendant is insolvent; nor is a threat to make an assignment for the benefit of creditors, and to prefer others, rather than the plaintiff sufficient.⁴ Nor will any removal or disposition of property be restrained unless it appear that it is threatened, or about to be made with *intent* to defraud creditors. The intent is the chief question to be considered, and therefore on a motion to dissolve the injunction, the defendant's affidavits should be drawn expressly to meet the question of intent; affidavits denying the debt, cannot properly be received.⁵

9. The effect of an injunction granted under this clause, is not to restrain *any* removal or disposition whatever of

¹ Reubens v. Joel, 13 N. Y. R., 488;
Perkins v. Warren, 6 How., 341.

² Id.

³ Olssen v. Smith, 7 How., 481.

⁴ Pomeroy v. Hindmarsh, 5 How., 487.

⁵ Brewster v. Hodges, 1 Duer, 609.

the defendant's property, but only a removal or disposition with intent to defraud creditors. If the threat be to transfer property generally, the injunction may, perhaps—there being no other objection—be as general as the threat.¹ But the statute was undoubtedly intended to prevent the consummation of some particular act, which the defendant threatens or is about to do, rather than to restrain generally the sale or disposition of property, and thus tie up all the business concerns of the defendant, pending litigation.² (See form No. 84).

10. The case for intervention is to be made out by affidavits, and the facts and circumstances should be shown so that the court can see that a fraud has been threatened, or is about to be perpetrated. It would not be sufficient to state generally in the language of the clause that the defendant threatens or is about to remove or dispose of his property, with intent to defraud his creditors; but the facts and circumstances from which such conclusions are to be drawn, must be set forth.

¹ Brewster v. Hodges, 1 Duer, 609; ² Id.
Perkins v. Warren, 6 How., 341.

SECTION XVII.

WHEN GRANTED. THE AFFIDAVIT.

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| 1. § 220. At what time it may be granted.
2. May be granted, but not served, before summons served.
3. Affidavit for injunction, what must state.
4. When complaint may be used as. | 5. Affidavits must conform to complaint.
6. By whom affidavit may be made.
7. Must state facts and circumstances.
8. Serving affidavits with injunction.
9. Affidavits must be filed. |
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1. "The injunction may be granted at the time of commencing the action, or at any time afterwards before judgment, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction."¹ The foregoing section is substantially as passed in 1848.

2. Although an action is not commenced until the summons is served, yet the practical construction given to the above section is, that it is not necessary to wait till the summons be served before an injunction may be granted; but the order will not become operative until the summons is served.² So, that were the summons is served by publication, the order would have no force until the expiration of the time prescribed for publication. But, although it is not essential that the summons be served before the order is granted, it is essential that the complaint be either served or filed,³ or that the affidavit shows that the

¹ Code, § 220.

² *Liffingwell v. Chave*, 19 How., 54; 10 Abb., 474.

³ *Morgan v. Quackenbush*, 22 Barb., 76; *People v. N. Y. Com.* Pleas, 3 Abb., 181.

complaint, when drawn, will state facts sufficient to warrant an order.¹

3. The affidavit on which the application is made must be positive and unequivocal, as far as the facts alleged lie within the knowledge of the affiant; and where any facts are alleged, upon information and belief, the source of such information must be set forth.² And it must be observed that there is a distinction between *stating* the sources of information and *setting them forth*. If the affiant's knowledge is derived from letters, papers or other documents, in his possession, or which it is in his power to procure, it would not be sufficient to state that the information was derived from such papers; but the papers themselves or copies of them must be presented with the application.³ But although facts may sometimes be alleged on information and belief, yet an affidavit on mere unsupported hearsay, will be wholly insufficient.⁴ (See form No. 53).

4. The complaint in the action, when duly verified, may be used as an affidavit, on which to procure an injunction, and will be sufficient without any separate affidavit.⁵ But it can only be so used where the injunction is sought under the first clause of section 219, as only in that case can the facts be set forth therein. When the complaint is used as an affidavit the facts therein should be positively alleged, or the sources of the information set forth, and it seems that the verification should be positive.⁶ (See form No. 53).

5. But if affidavits are used other than the complaint,

¹ Mattice v. Gifford, 16 Abb., 246.

² Crocker v. Baker, 3 Abb., 183;
Hecker v. Mayor, etc., 28 How., 211.

³ Bank of Orleans v. Skinner, 9 Paige, 305.

⁴ See De Nierth v. Sidner, 25 How., 419, and cases; Cook v. Roach, 21 How., 152, 112.

⁵ Woodruff v. Fisher, 17 Barb., 229; Levy v. Ely, 6 Abb., 89; 15 How., 395; Hecker v. Mayor, etc., 28 How., 211.

⁶ Hecker v. Mayor, etc.; Woodruff v. Fisher, ut supra.

in an application for an injunction under the first clause of section 219, the facts in the affidavits should be substantially the same as those alleged in the complaint. It is not competent for the plaintiff to add materially by affidavit to the cause of action set forth in his pleading; nor can he state matters in his affidavit, where there are no allegations in the complaint upon which such matter is based.¹ And the complaint must also be laid before the judge, together with the affidavits, at the time the application is made, for though it be not relied upon as a part of the proof, it is requisite to enable the judge to see that the plaintiff is entitled to the relief demanded, or that the act sought to be restrained is in violation of the plaintiffs rights, *respecting the subject of the action.*²

6. The affidavit may be made by the plaintiff, or by any other person having personal knowledge of the facts; but the affidavit should be made by the plaintiff himself, unless sufficient reasons exist for its being otherwise. It may be made by an attorney when the facts are within his own knowledge and sworn to positively; but if it afterwards appear that the facts, though apparently sworn to positively, were really stated on information and belief, the injunction granted thereon will be dissolved.³ If there is any material allegation, on which the right to an injunction rests, which is not within the personal knowledge of the plaintiff, or of the agent or attorney who verifies the pleading, or makes the affidavit, there should be annexed the additional affidavit of the person from whom the information is derived, verifying its truth.⁴

¹ Hentz v. Long Island R.R. Co., 18 Barb., 646; Austin v. Chapman, 11 N. Y. Leg. Obs., 103.

² Morgan v. Quackenboss, 22 Barb., 76.

³ See Moore v. Calvert, 9 How., 474; Rateau v. Bernard, 12 How., 464.

⁴ Bank of Orleans v. Skinner, 9 Paige, 305.

7. The application for an injunction is addressed to the discretion of the court, or judge, and to enable him to exercise that discretion properly, he must have before him the facts and circumstances upon which the plaintiff relies. It is not sufficient to state the facts generally, as that the defendant is doing some act in violation of the plaintiff's rights respecting the subject of the action, or that the defendant threatens, or is about to dispose of his property with intent to defraud his creditors. Such statements are legal conclusions, deduced from certain facts, and were they adopted as the basis of an injunction it would be substituting the conclusion of the affiant for that of the judge.

8. A copy of the affidavit upon which the injunction is granted must be served on the defendant with the injunction, and where more than one affidavit is used, copies of all should be served. But where the complaint is used as the affidavit, and is served as a complaint in the action, at the time the injunction is served, another copy of it need not be served as an affidavit. The object of the provision prescribing such service was to apprise the defendant of all the facts alleged, on which the injunction was granted, to enable him to proceed at once to vacate it. A service of an injunction, without serving a copy of the affidavit, will be irregular and the service will be set aside.¹ But an omission to serve the affidavits will not justify disobedience to the order, though it be ground for setting it aside for irregularity. The party enjoined should move at once to have it set aside, but meanwhile should obey its mandates.²

9. The affidavits on which an injunction is granted, must be filed within five days after it is granted, or the

¹ Penfield v. White, 8 How., 87.

² See Davis v. Mayor, etc., 1 Duer, 451, 485, 511.

defendant may move to dissolve it with costs.¹ But where, through mere inadvertence, they are not filed in time, the plaintiff will be allowed to file them after the motion has been made to dissolve the injunction, on payment of costs; or the plaintiff will sometimes be allowed to file them, without payment of costs, if he file them and notify the defendant thereof immediately on receiving notice of motion.² (For forms of affidavit, see appendix No. 53).

¹ Sup. Court, rule 4.

² *Leffingwell v. Chave*, 10 Abb., 472, 478.

SECTION XVIII.

ORDER TO SHOW CAUSE; AFTER ANSWER; AGAINST
CORPORATION.

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| 1. § 223. Order to show cause.
2. Enjoining defendant in mean time.
3. § 221. Injunction after answer.
4. When defendant will be restrained pending order to show cause. | 5. § 224. Suspending business of corporation.
6. When granted. |
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1. "If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the mean time, be restrained."¹ This section is as passed in 1848, except the words "*court or*," which were added in 1849. (See form No. 55).

2. The interim order restraining the defendant, is, to all intents and purposes, an injunction, and should be governed by the same rules as govern *ex parte* temporary injunctions. Security should be required, the same as in the ordinary case of injunctions.² The general practice, especially in the superior court of New York, is to grant in all cases an interim injunction under this section, and an order to show cause, and in no case, except of the most urgent necessity, should a temporary injunction be granted absolutely, without notice to the adverse party.³ (See form No. 55).

¹ Code, § 223.

² Methodist Churches v. Barker, 18 N. Y. R., 463; Sheldon v. Allerton, 1 Sandf., 701, note; Androvette v.

Bowne, 4 Abb., 440; S. C., 15 How., 75.

³ Androvette v. Bowne, ut supra.

3. "An injunction shall not be allowed after the defendant shall have answered, unless upon notice, or upon an order to show cause; but in such case, the defendant may be restrained until the decision of the court or judge, granting or refusing the injunction.¹" This section has not been changed since 1848.

4. Prior to the Code, a party could not be enjoined, after he had appeared in the suit, without notice of the application; but, as will be seen, the Code has extended the discretion of the judge until the defendant shall have answered. The practice, however, is virtually the same, for, unless in extraordinary cases, the court will require notice to be given, even before answer. Whether the judge will grant the interim injunction, under this section, is a matter that lies in his own discretion. Where the injury sought to be restrained is either existent or imminent, it will usually be granted. But where the intermediate restraint is likely to produce injury or inconvenience to the defendant, security may, and should be required.²

5. "An injunction to suspend the general and ordinary business of a corporation shall not be granted, except by the court, or a judge thereof, nor shall it be granted without due notice of the application therefor, to the proper officers of the corporation, except where the people of this state are a party to the proceeding, and except in proceedings to enforce the liability of stockholders in corporations and associations for banking purposes, after the first day of January, one thousand eight hundred and fifty, as such proceedings are, or shall be provided by law, unless the plaintiff shall give a written undertaking executed by two sufficient sureties, to be approved by the court or judge, to

¹ § 221.

² *Methodist Churches v. Barker*, 18

N. Y. R., 463; *Sheldon v. Allerton*,
1 Sandf., 701, note.

the effect that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise as the court shall direct.”¹

6. The cases in which an injunction can be granted against a corporation have been treated of heretofore, and it will only be necessary to refer to that section. The general principles affecting them are the same as in other and private cases. Where notice is required it must be a notice of at least eight days, as in the ordinary cases of motions on notice. The security prescribed to be given in this case is, substantially, to the same effect as the ordinary undertaking under section 222, with this distinction, however, that under this section the taking of sureties is no longer optional. (For forms under this section, see appendix Nos. 54, 55).

¹ Code, § 224.

SECTION XIX.

SECURITY.

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| <ol style="list-style-type: none"> 1. § 222. Security upon injunction. 2. Provisions by statute. 3. Form of undertaking. 4. Sureties. 5. Plaintiff need not execute. 6. Sureties must justify. | <ol style="list-style-type: none"> 7. Amount to be specified. 8. Provision for reference need not be inserted. 9. Substituting surety where one becomes insolvent. 10. Justice to indorse his approval; filing. |
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1. "Where no provision is made by statute as to security upon an injunction, the court or judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct."¹ This section has remained unaltered since 1849.

2. The only provisions made by statute as to security upon injunction, are those which relate to the staying of proceedings in personal and real actions.² But the Code has so nearly done away with the old practice of staying proceedings by injunction, that such provisions are almost practically obsolete. The language of the statute, providing such security, has been cited under the head of "Enjoining actions and judgments," and it will be unnecessary to repeat it here.³ (For form, see No. 57).

3. The undertaking required by this section of the

¹ Code, § 222.

² 3 R. S. (5th ed.), 270.

³ See ante, p. 269.

Code must be in writing, but no particular form is prescribed; a substantial compliance with the language of the section will be sufficient. But no provision for a reference need be inserted in the undertaking, as such means of computing damages does not depend upon the consent of parties.¹ (See form No. 56).

4. It rests in the discretion of the court or judge, granting the injunction, whether sureties shall be required or not. Where no sureties are required the undertaking must be signed by the plaintiff, or some one on his behalf, and the practice is, to require the obligor to justify as being a householder or freeholder, and worth double the sum specified, over and above all his debts and liabilities.²

5. When the judge deems proper to require sureties, it is his province to satisfy himself as to the sufficiency thereof, and therefore if an undertaking executed by one surety is approved by him, the law will be satisfied, and the order granted on such undertaking will be sustained.³ In the superior court it was formerly held, in respect to an undertaking required to justify an order of arrest—and the language whereof is similar to that of the above section—that the plaintiff must himself execute the undertaking, in all cases, even though a non-resident.⁴ But it is now settled, that where sureties are required, the undertaking need not be signed by the plaintiff, nor by any agent of his.⁵

6. When the undertaking is executed by sureties, they are required to justify; and the undertaking must be acknowledged or proved in like manner as a deed of real estate.⁶ The ordinary form of justification is an affidavit

¹ *Higgins v. Allen*, 6 How., 30; *Church of St. Peter v. Varian*, 28 Barb., 644.

² *Sheldon v. Allerton*, 1 Sandf., 701, note.

³ *Courter v. McNamara*, 9 How., 255; and see 4 Seld., p. 446.

⁴ *Richardson v. Craig*, 1 Duer, 666.

⁵ *Leffingwell v. Chave*, 19 How., 54; 10 Abb., 472; *Courter v. McNamara*, ut supra.

⁶ Sup. Court, rule 6.

indorsed upon, or attached to the undertaking, to the effect that the obligors are householders or freeholders, and worth double the sum specified over and above all their debts and liabilities.¹ But where the undertaking is otherwise sufficient, and there has been an omission to acknowledge it, it may be amended in that respect and be acknowledged *nunc pro tunc*.² Or if it is improperly executed in any respect, it can be amended on motion to the court.³ Where the amount of penalty was omitted in an injunction bond, and a blank space left instead, the bond was construed with reference to the order of the judge, and the obligors were held liable for the amount that should have been inserted.⁴

7. The amount in which the sureties bind themselves, should be specified in the undertaking, and their liability will not exceed that amount.⁵ It rests to a certain extent in the discretion of the judge granting the order, to fix upon the amount for which the undertaking should be given; but it should in all cases be sufficient to cover the probable amount of damages which the defendant may in any way sustain. Where it is not sufficient for that purpose the injunction may be dissolved,⁶ or modified, so as to prevent injury to the defendant.⁷

8. Prior to the Code, it seems to have been essential to have a provision in the bond, that the damages should be ascertained by reference, in order to justify that remedy; but it is no longer necessary to insert that provision, as such means of computing damages do not depend upon the consent of the parties.⁸ But it would be better to insert that provision, and thus place the matter beyond

¹ Sheldon v. Allerton, 1 Sandf., 701, note.

² Conklin v. Dutcher, 5 How., 386.

³ Bellinger v. Gardiner, 12 How., 381.

⁴ Mason v. Fuller, 12 Louisiana Ann., 68.

⁵ Dickerson v. Cook, 3 Duer, 324.

⁶ Ryckman v. Coleman, 21 How., 404.

⁷ Gurnee v. Odell, 13 Abb., 264.

⁸ Higgins v. Allen, 6 How., 30.

all doubt. This subject, and that of damages, will be considered hereafter.¹

9. Should one of the sureties to the undertaking become insolvent, or otherwise incompetent, the court has discretionary power to require a substitute.²

10. When the undertaking has been properly executed and acknowledged, the justice must indorse thereon his approval, or the injunction will be set aside or dissolved, as though no undertaking had been given.³ It is not necessary to serve a copy of the undertaking upon the defendant, but such undertaking, with the approval of the justice indorsed thereon, must be filed by the plaintiff's attorney, with the clerk of the proper county, within five days after the order is granted, or the proceedings will be vacated with costs.⁴ But where the party inadvertently omits to file the undertaking within that time, the court may relieve him with or without terms.⁵

¹ See post, sec. XXII, p. 341.

² Willett v. Stringer, 15 How., 310; 6 Duer, 686.

³ Sup. Court, rule 4; see Newell v. Doran, 21 How., 427.

⁴ Sup. Court, rule 4.

⁵ Leffingwell v. Chave, 19 How., 55; 10 Abb., 472.

SECTION XX.

FORM, SERVICE OF, AND OBEDIENCE DUE INJUNCTION.

- | | |
|---|-------------------------------------|
| 1. Injunction should be plain. | 6. Order must be obeyed. |
| 2. Service of. | 7. Even though erroneous. |
| 3. On agents, etc.; when persons bound by knowledge of. | 8. Who bound by injunction. |
| 4. Not to be served before summons; serving affidavits. | 9. What obedience must be rendered. |
| 5. Who bound by injunction against corporation. | 10. Disobedience, how punished. |
| | 11. Corporation, how punished. |

1. The language of the injunction order should in all cases be so clear and explicit, that an unlearned man can understand its meaning, without the necessity of employing counsel to advise him what he has a right to do, to save him from subjecting himself to punishment for a breach of the injunction; and the order should also be so carefully worded as not to deprive the defendant of any rights which the case made by the complaint or affidavit does not require that he should be restrained from exercising. In short it should appear in the injunction itself, without resort to extraneous helps, exactly what the defendant is enjoined from doing, and what he is not enjoined from doing.¹ The effect of an injunction to restrain the removal or disposition of property under the last clause of section 219, is only to restrain such removal or disposition *with intent to defraud creditors*, and the order should contain those words.² (For forms of injunction, see appendix Nos. 58 to 85).

¹ Laurie v. Laurie, 9 Paige, 235; Sullivan v. Judah, 4 Paige, 445.

² Brewster v. Hodges, 1 Duer, 609; Mitchell v. Bettman, 25 Barb., 410.

2. When the injunction has been granted, it must be personally served on the party to be restrained, and a copy of the affidavit, or other papers, on which it was allowed, must be served with it.¹ The proceeding being one to bring the party into contempt, none other than a personal service will be sufficient. Thus, service on the attorney of the defendant, instead of on the defendant, will not only be insufficient, but absolutely irregular, and such service will be set aside; but it will not invalidate the order.² When the injunction is granted by a judge, out of court, the service should be made by delivering to the party to be enjoined, a copy of such injunction, and of the affidavits on which it was granted, and at the same time showing him the original with the judge's signature.³ But where the order was granted *by the court*, it should be served by delivering a certified copy, instead of showing the original.⁴

3. When the attorneys and agents of the defendant are sought to be enjoined, personal service must be had on them in addition to that on the principal, otherwise they would not be in contempt by disobeying the order.⁵ But though an order has not been served upon a party, it seems, that if he have knowledge that it has been issued, and designedly commits acts, that he knows to be prohibited by such injunction, he may be punished as for a contempt.⁶ So, a party knowing such injunction to have been granted, will be punished for preventing, willfully and by force, the service thereof.⁷

4. The injunction will not become operative, and should not be served, until the summons in the action has been

¹ Becker v. Hager, 8 How.; 68; Code, § 220.

² Becker v. Hager, ut supra.

³ Watson v. Fuller, 9 How., 425; Coddington v. Webb, 4 Sandf., 639.

⁴ Mayor of N. Y. v. Conover, 5 Abb., 251.

⁵ Eden on Inj., 98.

⁶ People v. Compton, 1 Duer, 512, 553; Aff'd, 5 Seld., 263, 278; Livingston v. Swift, 23 How., 1.

⁷ Conover v. Wood, 6 Duer, 682; 5 Abb., 84.

served, but it is too late to raise the objection, after the defendant has appeared generally in the action, or after the summons has been served.¹ Where the injunction has been granted upon the verified complaint alone, the most convenient course is to serve the summons, complaint, and a copy of the order, at the same time, and thereby make the complaint serve a double purpose of complaint and affidavit. The service will be set aside as irregular, unless copies of the affidavits on which the injunction was granted be served with the order.² But the omission to serve such affidavits will not justify the defendant in disobeying the order; his proper course is to move to have it set aside.³ The service of copies of whatever papers were laid before the judge, and on which the order was issued, is equivalent to a service of a copy of the affidavit as required by the Code.

5. An order enjoining a corporation from doing an act, is binding upon every officer or member thereof, having actual knowledge of the contents of the injunction, and this, notwithstanding the order is directed to the corporate body by its corporate name.⁴ Where an injunction is granted against several individuals, but is served only on part of them, it is valid and binding upon those served, and will not be set aside for want of service upon the others.⁵

6. The injunction of a court of competent jurisdiction must be obeyed, so long as it exists, by all parties upon whom it has been served, or an attachment for contempt will be issued.⁶ And even though it has not been served, if the defendant have actual knowledge or information

¹ *Leffingwell v. Chave*, 10 Abb., 474; 19 How., 55; *Seebor v. Hess*, 5 Paige, 86; *Parker v. Williams*, 4 id., 439.

² Code, § 220; *Leffingwell v. Chave*, 19 How., 55; 10 Abb., 473.

³ *Davis v. Mayor, etc.*, 1 Duer,

485; 9 N. Y., 277; but see *Watson v. Fuller*, 9 How., 426.

⁴ *Davis v. Mayor, etc.*, 1 Duer, 451; 5 Seld., 263.

⁵ *Seebor v. Hess*, 5 Paige, 86.

⁶ *People v. Sturtevant*, 9 N. Y., 266; *McCardel v. Peck*, 28 How., 120.

that it has been granted, he is bound to obey it until the plaintiff has had reasonable time to serve it.¹

7. Where the injunction is clearly erroneous, or the service irregular, the defendant is not thereby absolved from obedience to its mandates. The remedy of the defendant lies in a motion to set aside or dissolve and not in disobedience. Where the words of the order are definite and peremptory his only course is to obey, or at once to procure a dissolution or alteration of it. If he fail to do either, he will be punished by attachment for contempt;² and the fact that the injunction was afterwards dissolved will form no justification for any disobedience that occurs during its existence.³

8. All persons, defendants in the action, upon whom the injunction is served, or who have knowledge or information of its existence, and their agents, attorneys and servants, are bound to obedience; but the service of the injunction upon a stranger to the action, not named in the order, would not bind him.⁴ So, an order restraining a corporation from doing an act, though directed to the corporate body by its corporate name, is binding upon every officer or member thereof having knowledge or information of its existence.⁵ When the injunctive order includes *agents and servants*, an agent or servant will be personally responsible for a willful breach of its commands; and even where those words are omitted, if a servant does, on behalf of his principal, an act that he knows that the principal is enjoined from doing, he will be punished for contempt.⁶

9. The obedience to be rendered must be positive and

¹ Mayor, etc., v. Conover, 5 Abb., 251; People v. Sturtevant, 9 N. Y. R., 278.

² Davis v. Mayor, etc., 1 Duer, 485; see 9 N. Y. R., 277.

³ Smith v. Reno, 6 How., 124.

⁴ Edmonston v. McLoud, 19 Barb., 361.

⁵ Davis v. Mayor, etc., 1 Duer, 451; 9 N. Y. R., 263.

⁶ Wellesley v. Mornington, 11 Beav., 181.

complete; all evasions or contrivances to nullify the injunction will be regarded in the same light as positive, palpable disobedience.¹ The party enjoined must not only himself refrain from any violation of the order, but must also direct his counsel, agents, and servants, to do likewise; and if he stand by and connive at a violation of the injunction by any other person, he will be guilty of a contempt.² So far has the principle been extended, that the courts have held that neither the advice of counsel, nor the declarations of the judge of an inferior court, could justify a violation of a plain and positive injunction.³ Where an injunction against the further prosecution of a legal proceeding is served upon the promovent therein, it is his duty not only to refrain from taking any further active part in the proceedings enjoined, but also to direct the officers of the court, and others who act in the proceeding at his instance and under his control, to delay any further steps in the matter pending the injunction.⁴

10. The disobedience to, or violation of, an injunction order, may be punished either by an attachment, to bring the party before the court to answer for the misconduct, or by an order to show cause why he should not be punished as for a contempt.⁵ But the general practice is, not to grant an attachment in the first instance, but to grant an order to show cause or to give notice. Notice of motion for an attachment, served with copies of the affidavits, is also undoubtedly correct.⁶ Where an order to show cause is granted, the course to be pursued conforms to the general practice of the court, on orders to show cause why relief should not be granted.⁷

¹ *Krom v. Hogan*, 4 How., 225; *Neale v. Osborne*, 15 How., 81.

² *Mayor, etc., v. Conover*, 5 Abb., 244; *Neale v. Osborne*, *supra*.

³ *Capet v. Parker*, 3 Sandf., 662.

⁴ *Mayor, etc., of N. Y., v. Conover*, 5 Abb., 244.

⁵ 3 R. S. (5th ed.), 851.

⁶ *Matter of Smethurst*, 2 Sandf., 724; *Davis v. Mayor, etc.*, 1 Duer, 451.

⁷ *Watson v. Fitz Simmons*, 5 Duer, 629; for practice in proceedings for contempt, see *Crary's Special Proceedings*.

11. In all cases where the court has power to issue an injunction, it has also power to compel obedience to its mandates ; and, although a corporation cannot be attached for contempt, as in case of a natural person, it may be punished, nevertheless, for a disobedience of the order by a fine, or the sequestration of its property.¹

¹People v. Albany & V. R. R. Co., see Davis v. Mayor, etc., 1 Duer, 20 How., 358 ; 12 Abb., 171 ; but 451, 484.

SECTION XXI.

DISSOLVING AND MODIFYING.

- | | |
|--|---|
| <ol style="list-style-type: none"> 1. § 225. Motion to vacate or modify injunction. 2. May be vacated or modified on <i>ex parte</i> application. 3. In what manner made under § 225. 4. Application on plaintiff's papers. 5. Where such application fails, may have leave to move on merits. 6. Motion to dissolve on answer only. 7. Where the answer denies all the equities. 8. Defendant may move to dissolve, though he opposed the granting. 9. All the defendants must answer before motion. | <ol style="list-style-type: none"> 10. Care to be taken in drawing the affidavits. 11. When defendant in contempt may move. 12. Copies of answer and affidavits to be served. 13. § 226. Affidavits on motion. 14. To oppose verified answer. 15. When motion granted copy order to be served. 16. Appeal and its effect. 17. Injunction does not become inoperative by death of party. 18. Abandoning, discontinuing, etc. 19. When judge to decide motion to dissolve, etc. |
|--|---|

1. "If the injunction be granted by a judge of the court, or by a county judge, without notice, the defendant, at any time before the trial, may apply, upon notice, to a judge of the court in which the action is brought, to vacate or modify the same. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon affidavits on the part of the defendant, with or without the answer."¹ (See forms Nos. 85, 86).

2. This section does not abridge the general jurisdiction of the court, and a motion may still be made to *the court* to dissolve an injunction.² Nor is it a substitute for section 324, but rather an addition to the powers conferred by that section. Hence, a judge of the court, or a county

¹ Code, § 225.

² Woodruff v. Fisher, 17 Barb., 230.

judge, has power, on an *ex parte* application, to vacate or modify an injunction order made by him without notice. But this power should be most carefully used, and an order once granted should never be vacated or modified without notice to the adverse party, except in extreme cases, where the delay required by the notice would work great injury.¹

3. The motion to vacate or modify an injunction, as provided in the above section, must be made upon the usual notice, or order to show cause; and may be made in one of three different ways. 1. On the ground of defects in the plaintiff's application, and proceeding, based upon such application and proceeding, and without either answer or affidavits on the part of the defendant. 2. On the complaint and answer alone, without affidavits on part of defendant; or, 3. On affidavits either with or without answer.

4. If the order is clearly bad in form, or granted by a judge without jurisdiction, or upon affidavits which are plainly insufficient, it would be proper to move without answer or affidavits; but in other cases the motion will be on facts extrinsic to the case as made by the plaintiff. Where the defendant moves on the plaintiff's papers, they are to be taken as true, being uncontradicted, and if they establish a *prima facie* case, the order should stand; but they will, however, be strictly construed against the plaintiff.² And when the motion is made on the plaintiff's papers it should be made without any unnecessary delay.

5. Where the defendant moves for a dissolution or modification on the plaintiff's papers, without introducing any answer or affidavits on his own behalf, and fails

¹ Peck v. Yorks, 41 Barb., 547. Moers v. Morro, 29 Barb., 361; 17

² Hathorn v. Hall, 4 Abb., 227; How., 280.

in his motion, he may, if a proper case be shown, have leave to renew his motion on the merits. It rests, however, in the discretion of the court, and will not generally be granted unless good faith be shown and strong reason for such indulgence. As a general rule the party moving for specific relief is bound, on such application, to present his whole case, and to exhaust all his grounds for interference.¹

6. Where the plaintiff's proceedings are regular and his application establishes a *prima facie* case, the defendant must base his motion for a dissolution or vacation of the injunction upon facts extrinsic to the case as made by the plaintiff. Such facts may be presented either by the answer alone, or by affidavits with or without the answer. Where the motion is made on the complaint and answer, it is well settled to be the general rule, that, if the answer deny fully and explicitly all the equities of the complaint, the injunction *in limine* will be dissolved. But to have this effect, the denial must cover the whole ground, and the answer must be verified positively by one having full knowledge of all the facts.²

7. But the rule is not absolute, since the continuing or dissolution of an injunction, like the granting, rests in the sound discretion of the court; and, although the answer make a positive denial, yet the court will look at the circumstances of the case and will continue or dissolve the injunction in the exercise of that discretion.³(a)

(a) As to whether plaintiff can introduce affidavits in opposition to answer see post, pl. 14.

¹ Desmond v. Woolf, 6 Leg. Obs., 389.

² Finnegan v. Lee, 18 How., 186; Clark v. Law, 22 How., 426; Ryckman v. Coleman, 21 How., 404; 13 Abb., 398; Roberts v. Anderson, 2

John. Ch., 204; Ward v. Van Bokkelen, 1 Paige, 100.

³ Carpenter v. Danforth, 19 Abb., 225; Roberts v. Anderson, 2 John. Ch., 205.

8. Notwithstanding the fact that the defendant has appeared on the return of an order to show cause, and opposed the granting of an injunction, he is still at liberty, on the coming in of the answer, to move to dissolve or modify the injunction, on such answer, or on affidavits.¹

9. But it was a general rule under the old practice that all the defendants must answer before a motion based upon the answer only, could be made. Where, however, the plaintiff was dilatory in prosecuting his suit, an injunction might be dissolved, though some of the defendants had not answered.²

10. Where the motion for dissolution or vacation is based upon affidavits, on the part of the defendant, with, or without answer, care should be taken to especially negative the title of the plaintiff to the specific remedy of injunction. Thus, where the injunction was granted to prevent a removal or disposition of property, with intent to defraud creditors, the only question to be considered, upon the motion to dissolve, is the *intent*, and affidavits denying the indebtedness of the defendant will not be received.³

11. It is no defense to a motion to vacate or modify an injunction, to show that the defendant has disobeyed the order. His right to move is not lost until he has been *adjudged in contempt*, and not even then, as to any matter of positive right.⁴ But where the application is addressed to the favor of the court, a party in contempt will not be heard;⁵ the disobedience, however, should have been willful and actual, and not merely technical or excusable.⁶ And when the plaintiff's case fails for want of equity, the

¹ Hazard v. Hudson River R. R. Bridge Co., 27 How., 296.

² Depeyster v. Graves, 2 John. Ch., 149.

³ Brewster v. Hodges, 1 Duer, 609.

⁴ Smith v. Reno, 6 How., 124.

⁵ Krom v. Hogan, 4 How., 225.

⁶ Gurnee v. Odell, 13 Abb., 264.

motion will be granted on proper terms, notwithstanding the contempt.¹

12. Where the motion is based upon the answer, or upon affidavits, copies thereof must be served upon the plaintiff's attorney with the notice of motion.

13. "If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs, in addition to those on which the injunction was granted."²

14. When affidavits, other than the answer, are used by the defendant, on the motion, there can be no doubt of the right of the plaintiff to use other affidavits in opposition. But great diversity of opinion exists in the courts as to whether the plaintiff can use additional affidavits in opposing a motion made upon a verified answer only. On the one hand it is held by several judges, both of the supreme and superior courts, and both at special and general terms, that when the defendant bases his motion on the verified answer alone, the plaintiff cannot read affidavits in opposition, nor even his reply to such answer.³ Others hold that where the answer goes beyond a mere denial, and sets up new matter in avoidance, and on the strength of which new matter the defendant relies to dissolve the injunction, the plaintiff may contradict such new matter by further affidavits;⁴ while others hold with much force, that the defendant can only use his answer on such motion as an affidavit, and that, therefore, the plaintiff is at liberty to meet it with opposing affidavits. The Code has made no provision for moving to vacate an

¹ Field v. Hunt, 22 How., 329.

² Code, § 226.

³ Hartwell v. Kingsley, 2 Sandf., 674; Blatchford v. New Haven R. R., 7 Abb., 322; Merrimack Manuf. Co. v. Garner, 4 E. D. Smith, 387; Servoss v. Stannard, 2 Code R., 56.

⁴ Krom v. Hogan, 4 How., 225;

Hartwell v. Kingsley, 2 Sandf., 674;

see Powell v. Clark, 5 Abb., 72;

Davis v. Hackley, 14 Abb., 64, note.

Hollins v. Mallard, 10 How., 540;

Minor v. Buckingham, 8 Abb., 68;

Hascall v. Mad. Univer., 8 Barb., 174;

Schoonmaker v. Reformed Dutch Church, 5 How., 265.

injunction order on an *answer as such*, and it would certainly seem that if the defendant use his answer on the motion, that it must be considered as an affidavit, to which the plaintiff may reply.¹

15. Where the motion to vacate or modify an injunction is granted, it is the duty of the defendant's attorney to serve a copy of the order vacating or modifying upon the adverse party.

16. An appeal to general term lies from an order at special term, or at chambers, continuing, modifying, or vacating an injunction, but not to the court of appeals, it being a matter that rests in the discretion of the court.² But an appeal from an order dissolving an injunction, does not revive the injunction. The court may grant a temporary injunction pending the appeal. But such an injunction is a *new* one, and a *new* undertaking must be given.³

17. An injunction does not become inoperative by the death of either party to the action; but an order may be granted requiring the plaintiff; or his representatives, to revive the action within a limited time, and in default of such revival the injunction will be dissolved.⁴

18. The plaintiff has a right to abandon an injunction by giving notice of his intention to the defendant, and a motion to dissolve will be unnecessary.⁵ So, a plaintiff can put an end to the injunction by discontinuing the suit.⁶ So, if the complaint be dismissed, the injunction falls.⁷ But an amendment of the complaint, by leave of

¹ See the able opinion in *Fowler v. Burns*, decided at general term, superior court, 7 Bosw., 637; also cases above cited.

² See *Vandewater v. Kelsey*, 1 Comst., 533; 3 How., 338; *Selden v. Vermilyea*, 1 Comst., 534; 3 How., 338.

³ *Wood v. Dwight*, 7 John. Ch.,

295; *Hart v. Mayor, etc.*, 3 Paige, 381; *Town-Guilford v. Cornell*, 4 Abb., 220.

⁴ *Hawley v. Bennett*, 4 Paige, 164.

⁵ *Shearman v. N.Y. Cent. Mills*, 11 How., 269.

⁶ *Hope v. Acker*, 7 Abb., 308.

⁷ *Hoyt v. Carter*, 7 How., 140; *Loomis v. Brown*, 16 Barb., 330.

the court, will not affect an injunction, even if the order does not express that it is without prejudice.¹

19. It is the duty of the judge before whom the motion to dissolve or modify an injunction order is made, to render and make known his decision thereon, within twenty days after the motion is submitted to him for his decision.² (For forms, see appendix Nos. 85, 86).

¹Selden v. Vermilyea, 4 Sandf. Ch., 573.

²Code, § 401, sub. 8.

SECTION XXII.

ASSESSMENT OF DAMAGES.

- | | |
|--|---|
| 1. Damages may be assessed by referee. | 8. Defendant enjoined, but not served, may recover damages. |
| 2. Undertaking need not provide for reference. | 9. Want of jurisdiction in judge will not deprive defendant of. |
| 3. When reference may be ordered. | 10. What report must contain. |
| 4. After a discontinuance, etc. | 11. Report must be confirmed. |
| 5. Notice of motion for reference. | 12. How damages recovered after assessment. |
| 6. What damages to be allowed. | |
| 7. What special damages. | |

1. As has been before seen, the undertaking to be given on procuring an injunction, must be to the effect that the plaintiff will pay to the party enjoined, such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.¹ (See forms Nos. 87 to 89).

2. Although there was a rule of the court of chancery, similar to the last clause of section 222, yet it was formerly held that a reference could not be ordered to assess damages, unless it was so nominated in the bond;² but it is no longer essential to be inserted in the bond or undertaking, as the parties are presumed to know the law and to contract with reference thereto.³

3. The reference cannot be ordered until the court shall finally decide that the plaintiff was not entitled to the injunction. This must be a final decision; that is, one made at the termination of the action, by a judgment

¹ Code, § 222.

² *Garcie v. Sheldon*, 3 Barb., 232.

³ *Higgins v. Allen*, 6 How., 80.

therein, or by a voluntary discontinuance of the suit; and the decision must be, that the plaintiff was not, at the time of obtaining the injunction, entitled thereto. A reference cannot be properly had until judgment has been entered.¹ Thus, where a referee in the action had reported in favor of dismissing the complaint with costs, but no judgment upon his report had been entered, a motion for a reference was held to be premature.²

4. A dissolution of an injunction on the merits, followed by a discontinuance, is equivalent to a final decision within the meaning of the section, and a reference may be ordered thereon.³ So, a judgment of dismissal on the final hearing is a final decision against the plaintiff's right.⁴ But a voluntary waiver of an injunction is not an admission that the plaintiff was not entitled to it, and a reference cannot be had until after a final adjudication.⁵

5. The motion for an order of reference to ascertain damages, must be upon the usual notice of eight days to the plaintiff; but it is not obligatory on the defendant to give notice to the sureties in the undertaking.⁶ It rests, however, in the discretion of the court to order them to be notified, and it should, as a general rule, be done, since they are concluded as to the amount of the damages by the referee's report.⁷ (See form No. 87).

6. In ascertaining the damages sustained by an injunction, reasonable counsel fees and expenses incurred by the defendant in procuring a dissolution of the injunction, are properly included.⁸ Such fees are not limited to the

¹ *Shearman v. N. Y. Cent. Mills*, 11 How., 269; *Methodist Churches v. Barker*, 18 N. Y. R., 463.

² *Weeks v. Southwick*, 12 How., 170.

³ *Carpenter v. Wright*, 4 Bosw., 655; *Coates v. Coates*, 1 Duer, 664.

⁴ *Loomis v. Brown*, 16 Barb., 325.

⁵ *Shearman v. N. Y. Cent. Mills*, 11 How., 269.

⁶ *Methodist Churches v. Barker*, 18 N. Y. R., 463.

⁷ *Wilde v. Joel*, 15 How., 320; 6 Duer, 671; *Methodist Churches v. Barker*, ut supra.

⁸ *Fitzpatrick v. Flagg*, 12 Abb., 189; *Wilde v. Joel*, 15 How., 321; *Coates v. Coates*, 1 Duer, 664.

costs allowed by the Code, nor is it essential that they should have been paid; if they are actually incurred it will be sufficient. But costs and expenses in the suit generally, not arising out of, or consequent upon the injunction, cannot be allowed.¹ If, however, a person is made a party to an action solely for the purpose of enjoining him, it would seem that his general counsel fees and expenses should be allowed.²

7. Special damages caused by the injunction, as injury to works, loss of the use of property, loss of trade, deprivation of property, etc., are, of course, to be included. So, the judgment in the suit may be declared to be damages. As where an attachment had been issued in one suit, and the attached property had been taken by a third party under protection of an injunction which he had obtained in another suit against the plaintiff in the attachment suit, and such injunction suit was subsequently dismissed, it was held that the judgments in both suits were proper damages against the plaintiff and sureties in the injunction suit.³ So, where the plaintiff claimed to be owner of timber lying on the defendant's land, and brought an action to establish his title, and got an injunction forbidding the defendant, who also claimed the timber, from asserting his alleged ownership, by suit, or in any other way, pending the principal suit; and the plaintiff afterwards failed in his suit, and the property was awarded to the defendant, and it appeared that the plaintiff had carried off the timber and destroyed its identity and converted it to his own use, it was held that the measure of damages was, *prima facie*, the value of the property in question.⁴

8. The undertaking is for the benefit of all the defendants that are enjoined, whether the injunction is served

¹ Coates v. Coates, 1 Duer, 664;
Edwards v. Bodine, 11 Paige, 224.

² Wilde v. Joel, 15 How., 321.

³ Taacks v. Schmidt, 18 Abb., 307.

⁴ Barton v. Fisk, 30 N. Y. R., 166.

upon them or not. Since it is the duty of every person named in the order and who has knowledge or information of its existence, to obey its mandates, whether or not it be served upon him, he may recover from the sureties all damages sustained by reason of such obedience.¹

9. A judge related by affinity to one of the parties to an action within the degree which would exclude him as a juror, cannot grant an injunction therein; and such injunction, if granted, will be dissolved.² But want of jurisdiction of the court will not prevent the defendant from recovering costs and damages on the undertaking, on the dismissal of the complaint.³

10. It is not sufficient for the referee to report the facts simply; but he must ascertain and report the amount of damages which the defendant has sustained by reason of said injunction. Where such damages are not reported, the court will refuse to confirm the report.⁴

11. Before the referee's report can be acted upon it must be confirmed by the court, on special motion, and notice of such motion should be served upon the plaintiff. But it is not necessary to give notice to the sureties.⁵ When confirmed, the report is conclusive, as to the extent of the damages, upon the principal and sureties to the undertaking, though the sureties have no notice of the reference.⁶ (See form No. 89).

12. The damages, when assessed by the referee, are to be recovered by an action on the undertaking;⁷ although in one case, the court ordered judgment to be entered on the referee's report, and ordered payment to be made by

¹ *Cumberland Coal Co. v. Hoffman Co.*, 39 Barb., 16; 15 Abb., 78.

² *N. Y. & N. Haven R. R. Co. v. Schuyler*, 28 How., 187.

³ *Cumberland Coal Co. v. Hoffman Co.*, *supra*.

⁴ *Taacks v. Schmidt*, 19 How., 413.

⁵ *Griffing v. Slate*, 5 How., 205;

Wilde v. Joel, 15 How., 320; *Methodist Churches v. Barker*, 18 N. Y. R., 463.

⁶ *Methodist Churches v. Barker*, *ut supra*.

⁷ *Wilde v. Joel*, 15 How., 320; see *Higgins v. Allen*, 6 How., 30.

the parties to the bond;¹ but the authority to do this is very questionable. The reference is merely to *ascertain* the damages; besides, defenses may exist to the undertaking, from which the parties thereto cannot be properly precluded.² It seems not to be necessary to apply to the court for leave to bring an action on the undertaking,³ although it was formerly held otherwise.⁴ When it is necessary, the defendant in the injunction suit may have an order that the undertaking be delivered to him for prosecution; but where the undertaking is in the usual form, it will not be necessary to remove it from the hands of the clerk, as an inspection and production will enable him to draw his complaint and maintain his suit.⁵ (See forms herein, appendix Nos. 87, 88, 89).

¹ Willett v. Scovill, 4 Abb., 405.

² Wilde v. Joel, 15 How., 320; 6 Duer, 671.

³ N. Y. Cent. Ins. Co. v. Safford, 10 How., 347.

⁴ Griffing v. Slate, 5 How., 205;

Higgins v. Allen, 6 How., 30.

⁵ Wilde v. Joel, 15 How., 320.

CHAPTER IV.

ATTACHMENTS.

SECTION I. In what cases granted.

II. The affidavit.

III. The undertaking.

IV. The warrant, by whom granted and what to contain.

V. What property may be attached.

VI. How warrant executed.

VII. How levied on property incapable of manual delivery.

VIII. Perishable property. Where property is claimed by third person. Vessels.

IX. Effect of an attachment.

X. Judgment. How satisfied. Action by plaintiff. Where judgment is for defendant.

XI. Discharge of attachment.

XII. Return of warrant. Sheriff's fees. Costs and allowances.

SECTION I.

IN WHAT CASES GRANTED.

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| <ol style="list-style-type: none"> 1. § 227 of the Code. Cases for an attachment. 2. Nature of the remedy. 3. How it differs from that under the revised statutes. 4. In what actions it may be had. 5. Cannot be granted in actions on equitable debts. 6. Debt must be due. 7. When creditor, holding property as security, cannot have. 8. Who may have the remedy. 9. Against foreign corporation. 10. Assigning cause of action to resident. 11. Proof that plaintiff is a resident, etc., need not be made primarily. 12. Against non-residents. 13. Definition of term <i>resident</i>. 14. General rules relating to domicile or residence. 15. Who are held to be <i>non-residents</i>. 16. Persons residing out of the state, but doing business in it. 17. Who are not <i>non-residents</i>. 18. As to persons having two residences. 19. Persons in the army or navy. 20. Domicil of wife living separate. 21. Against debtor who absconds or conceals himself. 22. What constitutes an absconding. 23. Residence in this state essential. | <ol style="list-style-type: none"> 24. Is a personal act. 25-27. What constitutes a concealment. 28. How fact of concealment stated in affidavit. 29. When proof of either of two intents will be sufficient. 30. Against debtors removing their property. 31. Must be with fraudulent intent. 32. What is meant by term "his property." 33. Question of intent one of fact. 34. Against debtors fraudulently disposing of their property. 35-36. Threat to make assignment, when sufficient. 37. Where assignment is already made. 38. What is included in the term "property." 39. Omissions in a deed not conclusive evidence of fraud. 40. What facts show fraudulent intent. 41. Must be sworn to positively. 42. Where one joint debtor absconds or is a non-resident. 43. Does not lie against executors, heirs, or other representative persons. 44. Attachment and arrest together. 45. Attachment in an action commenced by publication. 46. When the remedy may be had. |
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1. "In an action arising on contract for the recovery of money only, or in an action for the wrongful conversion of personal property, against a corporation created by or under the laws of any other state, government or country, or against a defendant who is not a resident of this state, or against a defendant who has absconded or concealed himself, or whenever any person or corpora-

tion is about to remove any of his or its property from this state, or has assigned, disposed of or secreted, or is about to assign, dispose of or secrete any of his or its property with intent to defraud creditors, as hereinafter mentioned, the plaintiff, at the time of issuing the summons, or any time afterwards, may have the property of such defendant or corporation attached, in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover; and for the purposes of this section an action shall be deemed commenced when the summons is issued, provided, however, that personal service of such summons shall be made, or publication thereof commenced within thirty days."¹

2. The attachment provided by this chapter of the Code, is an order in the action, for the arrest of the debtor's property, in the nature of bail for the payment of such judgment as the plaintiff may obtain. It is not a process for the commencement of an action, and by it a suit is not commenced, nor upon it alone can a judgment be recovered; it is a provisional remedy, simply adopted in aid of a suit already commenced, to secure the eventual satisfaction of a creditor's demand.²

3. There are two forms of proceeding by attachment, other than the one provided by the Code; that under the revised statutes,³ and that under the act abolishing imprisonment for debt.⁴ But they are both essentially unlike the one under consideration. The attachments issued under the revised statutes and the act of 1831, are special proceedings, and are the original process by which the suits are commenced, and the judgment obtained is in the nature of a judgment *in rem*.⁵ So, an attachment

¹ Code, § 227, as amended, 1866.

³ 3 R. S. (5th ed.), 430, §§ 24, 26;

² Houghton v. Ault, 16 How., 77; id., p. 78.

Furman v. Walters, 18 How., 349;

⁴ Laws 1831, 404, §§ 34, 35; Laws 1842, chap. 107, p. 74.

⁵ Id.

Cole v. Kerr, 2 Sandf., 660.

under the revised statutes is for the benefit of all the creditors, while that provided by the Code is for the benefit of the creditor who applies for it.¹ In these and other respects, the proceedings under the revised statutes and the act of 1831, differ from the remedy given by the Code, so that the latter is not cumulative, but is the only remedy known to the law in the cases prescribed.²

4. As a general rule, in this country, all attachments are grounded upon actions of debt;³ but our legislature have, by the amendment of 1866, extended the remedy to actions for the wrongful conversion of personal property. Prior to that amendment, an attachment could only issue, "in an action for the recovery of money;" yet it was held in some cases that that language did not limit it to an action for the recovery of money only, and that the remedy could be had in that class of actions in which pecuniary damages are sought,⁴ as in an action of assault and battery.⁵ But these decisions have been since disapproved; and the courts have decided that an attachment could not be issued in any action of tort, independent of contract, as in an action of *trespass de bonis*.⁶ This question has been finally settled by inserting in the first clause of the section, the words, *arising on contract*, and also the word *only*, so that it now reads, "In an action arising on contract for the recovery of money only."⁷ Therefore, under the Code as it now stands, it is clear that an attachment cannot be granted in any action founded in tort, except for the conversion of personal property. The rule, as

¹ Fisher v. Curtis, 2 Code R., 62; 2 Sandf., 660; see Frazer v. Greenhill, 3 Code R., 172.

² Skinner v. Stuart, 39 Barb., 206.

³ Drake on Attachments, p. 13, §10.

⁴ Hernstein v. Matthewson, 5 How., 196; Ward v. Begg, 18 Barb., 139.

⁵ Floyd v. Blake, 19 How., 542; 11 Abb., 349.

⁶ Saddlesvene v. Arms, 32 How., 280; Shafferv. Mason, 29 How., 55; Gordon v. Gaffey, 11 Abb., 1; see also 9 Bosw., 601.

⁷ Amendment of 1866.

laid down by the supreme court of Wisconsin, is undoubtedly correct, that though the plaintiff should, in his affidavit for obtaining the attachment, allege a cause of action founded on contract, yet, whenever it appears, either by the pleadings or otherwise, that the true cause of action is not of that character, it is the duty of the court to vacate the order.¹

5. The debt or contract must be of such a nature as will sustain an action at law. Equitable debts are not sufficient to justify an attachment. Therefore, in an action for an accounting, or for the foreclosure of a mortgage, or in an action for an injunction against the infringement of a trade mark, with damages, an attachment is not allowable.²

6. The debt must also be due, or it cannot sustain an attachment. Thus, no attachment can be granted upon a bond, bill or note not due; nor for a book debt, for payment of which time has been given, until such time shall have elapsed.³ But where A agreed with B, that if B would sell him goods on credit, and also guaranty his liability to C for a certain sum, he would consign to B all the fish he should become possessed of in his business in Nova Scotia, as security for the guaranty and the goods, and B accordingly sold him the goods and became guarantor to C, and, subsequently, A refused to consign the fish to B; and thereupon, and before the term of credit had expired, B obtained an attachment against A; it was objected that the attachment should be discharged, as the credit had not expired, and therefore no cause of action existed; but the court held, that the contract to give security was broken, and an action might be sustained for

¹ See Drake on Attach., § 10, citing Elliott v. Jackson, 3 Wis., 649.

² Shaffer v. Mason, 18 Abb., 291, note; Guilhon v. Lindo, 9 Bosw., 601;

Ackroyd v. Ackroyd, 20 How., 93; 11 Abb., 345.

³ Drake on Attach., § 9.

the breach of it, without any reference to the time of the credit; except that if a judgment were obtained before the credit expired, the court could stay the collection thereof until the credit should expire, or vacate it if the agreed security should be given.¹

7. But, it seems, one may be in fact a creditor, for an amount certain, and yet not be in a position to enable him to have an attachment. Thus, it was held in Massachusetts, that where one had received personal property in pledge for the payment of a debt, he could not lawfully attach other property for that debt without first returning the pledge.²

8. Whoever can sustain the kind of action in which an attachment is allowable, may have that remedy. An attachment may issue in favor of a non-resident plaintiff, in the same cases as though he were a resident;³ except against a foreign corporation; in which case a non-resident plaintiff cannot have an attachment, unless the cause of action has arisen, or the subject of the action is situated, within this state.⁴ And the rule is the same whether the plaintiff be a non-resident individual, or a foreign corporation.⁵ The foreign character of a corporation is not to be determined by the place where its business is transacted, or where the corporators reside, but by the place where its charter was granted. So far as it is regarded with reference to inhabitancy, it is considered as an inhabitant of the state in which it was incorporated.⁶ The assignee of a demand may have an attachment in those cases where the assignor might have had one;⁷ and it

¹ Ward v. Bigg, 18 Barb., 139.

² Drake on Attach., § 35, citing 8 Mass., 150.

³ Ready v. Stewart, 1 Code R., N. S., 297; see also 2 Barb., 436.

⁴ Code, § 427; Cantwell v. Dubuque

R. R., 17 How., 16; see McDonough v. Phelps, 15 How., 372.

⁵ Western Bank v. City Bank, 7 How., 238.

⁶ Drake on Attach., § 80, and cases.

⁷ Besley v. Palmer, 1 Hill, 482.

seems that a resident assignee may have that remedy, even where the non-resident assignor was not entitled to it.¹

9. An attachment may be granted against a corporation created by or under the laws of any other state, government or country.² But an action against such corporation can only be brought in the supreme court, the superior court of the city of New York, or the court of common pleas of the city and county of New York, by a resident of the state for any cause of action; and by a non-resident plaintiff, when the cause of action has arisen, or the subject of the action is situated, within this state.³ It has been held that the *subject of the action* in such case, is the claim asserted by the plaintiff, and the satisfaction of which he seeks out of the property. The property itself is not the subject of the action, and the mere fact that a foreign corporation has property in this state will not justify an attachment. This was in an action for alleged breach of contract made out of this state.⁴ So, where the demand in action arose upon a written contract for the payment of money, made, executed and delivered and made payable in Canada, and all the labor done, and materials furnished, were under this contract and upon works located in Canada, for a corporation created by the laws of Canada, and existing there, except a small part of the work, which was performed in this state, under said contract; it was held, not to be a case where the subject of the action was situated in this state; and although the defendant, the foreign corporation, had property within this state liable to attachment, the attachment could not be sustained, by a non-resident plaintiff.⁵ So, where a negotiable instrument was made at the office of the de-

¹ McBride v. the Farmers' Bank, 26 N. Y. R., 450.

² Code, § 227.

³ Code, § 427.

⁴ Whitehead v. Buf. & Huron R. R., 18 How., 218.

⁵ Campbell v. Proprietors of Ch. & St. Law. R. R., 18 How., 412.

fendant, in the state of Iowa, and made payable in the city of New York, held that the cause of action arose out of the state.¹ But in an action on a policy of insurance issued and delivered in this state, the cause of action was decided to have arisen within this state.²

10. A cause of action on which a non-resident plaintiff would not be entitled to an attachment, may be assigned to a resident of the state, for the purpose of obviating the difficulty; and such assignment will not be a fraud upon the statute or the rights of the defendant.³

11. Although it is essential to the jurisdiction of the court in an action against a foreign corporation, that the plaintiff should be either a resident of the state, or that the cause of action should have arisen, or the subject of the action should be situated within it, yet it is not necessary to the validity of the proceedings against such corporation, that proof of either of those facts should have been made previous to the commencement of the proceedings; and it is sufficient if a state of facts which sustains the jurisdiction is made out when a motion is made to vacate the proceedings.⁴

12. The attachment may issue against a defendant who is not a resident of this state.⁵ There has been much discussion, in the courts, as to the interpretation to be given to the term "resident," as used in the above and other statutes, regulating the rights and remedies of creditors. Most of the decisions, before the Code, leaned to a liberal construction of the law in favor of creditors. Some of them really, and others virtually, holding that *actual* residence, without regard to the domicile, was within the contemplation of the particular statutes which were

¹ Cantwell v. Dubuque R. R. Co., 17 How., 16.

² Burns v. Provincial Ins. Co., 35 Barb., 525; 13 Abb., 425.

³ McBride v. Farmers' Bank of Salem, 26 N. Y. R., 450.

⁴ Bates v. New Orleans, etc., R. R., 4 Abb., 72.

⁵ Code, §§ 227, 229, *supra*.

the subjects of interpretation.¹ Under our former practice respecting attachments and non-imprisonment of debtors, where the attachment or warrant was the process for the commencement of the action, and where there was no other way of reaching the property of a debtor, whose domicile was in this state, but who remained abroad, such a construction might be justified by the necessity of the case and in furtherance of justice. But as the necessity no longer exists, that rule should be no longer followed.

13. The leading decisions since the Code, hold, that, where the Code in its provisional remedies, uses the term, "resident" or "residence," *legal residence* is meant, or in other words, the place of a man's fixed habitation, where his political and social rights and duties are exercised; and that the words *legal residence*, *inhabitaney*, and *domicil*, are convertible terms."² Bouvier defines "resident" as a person coming into a place with intention to establish his domicile or permanent residence, and who in consequence actually remains there. Burrill, as one who has a seat, or settlement in a place; one who dwells, abides, or lives in a place; an "*inhabitant*," one who resides or dwells in a place for some time; and "*domicil*," as a place where a person has his home; a residence at a particular place, accompanied by positive or presumptive proof of an intention to remain there for an uncertain time. The Roman law defines *domicil* to be the place where a man has set up his household gods and made the chief seat of his affairs and interests.³ Residence combined with intention constitute a domicile.⁴

14. The following are the general rules relating to

¹ See Haggart v. Morgan, 4 Sandf., 552; Houghton v. Ault, 16 How., 198; 1 Seld., 422; matter of Thompson, 1 Wend., 45; Frost v. Brisbin, 19 Wend., 14. 77; see Roosevelt v. Kellogg, 20 John., 210.

² 2 Domat, 484.

³ Crawford v. Wilson, 4 Barb., 504; Chaine v. Wilson, 16 How.,

⁴ 2 Kent's Com., 430.

domicil, or legal residence. Every person must have a domicil somewhere, and he can have only one domicil at one and the same time. Every person has a domicil of origin, which he retains until he acquires another. The domicil of origin arises from birth or connections. The domicil of a minor follows that of his father, and remains until he acquires another, which he cannot do until he becomes a person *sui juris*.¹ The domicil of the wife is generally that of the husband.² Where the father is dead, the domicil of the children follows that of the surviving mother.³ A man's being in a place is *prima facie* evidence that he is domiciled there, but it may be explained and the presumption rebutted.⁴ His mode of living is not material, whether on rent, at lodgings, or in the house of a friend.⁵ There is no fixed period of time necessary to create a domicil. It may be acquired after the shortest residence under certain circumstances, and, under others, the longest residence may be insufficient.⁶ There must be both the fact of the abode and the intention of remaining indefinitely — *factum et animus*. Both must be proved. The first is readily proved by a single fact; the other may be established by the declaration of the party, or his conduct, which is, at least, as satisfactory evidence, as his declarations upon such a question.⁷ Nor is it enough that one intends to change his domicil, and sincerely believes that what he has done amounts in law to such a change, unless an *actual* change has taken place.⁸

15. Under these general rules it has been decided, that if a person leave his domicil temporarily, and for a par-

¹ Crawford v. Wilson, 4 Barb., 504; see 4 Cow., 516, note.

² Vischer v. Vischer, 12 Barb., 640.

³ 4 Cow., 516, note.

⁴ 14 How., U. S., 401; 4 Cow., 516, note.

⁵ Parsonsfield v. Perkins, 2 Green., 411; 4 Cow., 516, note.

⁶ High appellant, 2 Douglas, 515; Vischer v. Vischer, 12 Barb., 640; 4 Cow., 516, note.

⁷ Hegeman v. Fox, 31 Barb., 475; Vischer v. Vischer, 12 Barb., 640.

⁸ Lee v. Stanley, 9 How., 272; Chaine v. Wilson, 1 Bosw., 673.

ticular purpose, as to teach a school, and does not take up a permanent residence elsewhere, he does not change his residence.¹ So, a person does not become a resident by coming into the state on a commercial adventure, without intention of settling here.² Where a foreigner, who had resided in this state, and transacted business as a commission merchant for seven years, returned home, taking with him his effects, uncertain whether he would return or not, but who, after a sojourn of only three weeks in his native land, returned to this state, intending to commence business in Canada; it was held that he had not abandoned his domicil of origin, and was not a resident, or inhabitant under the non-imprisonment act.³ An inhabitant of another state, who is here temporarily, for pleasure or business, intending to return, is not a resident.⁴ As, where a person domiciled in New Jersey, having a dwelling and establishment there, came to New York, for the benefit of his health, hired a house, and died here after two years, he was held not to be a resident of this state under the statutes relating to proof of wills.⁵ So, where a person, who had formerly been a resident of another state, had with his family removed to this state, and was then residing with a relative, while he was looking for an opportunity to engage in business, and was undetermined whether he should finally settle in this state or not, he was held not to be a resident of this state within the meaning of section 227 of the Code.⁶ A resident of this state went to Wisconsin with a stock of goods, with intent to make it his permanent residence, leaving his wife and child at board in this state. He remained in Milwaukee ten months in business, and during

¹ Crawford v. Wilson, 4 Barb., 504.

² In the Matter of Fitzgerald, 2 Caines, 317.

³ In the Matter of Wrigley, 4 Wend., 602; Aff'd 8, 134.

⁴ Boardman v. House, 18 Wend., 512.

⁵ Isham v. Gibbons, 1 Bradf., 69.

⁶ Burrows v. Miller, 4 How., 349.

the time was appointed by the legislature of Wisconsin a commissioner to distribute the stock of a bank and director of the same. He then returned to this state on a visit, and after staying two months, was arrested and held to bail; it was held that he was not a resident of this state.¹

16. It is also well settled that the carrying on a mercantile business in this state, and staying within our limits for the purposes of business, during all the hours usually devoted to business here, do not alone constitute residence within the meaning of the statute. And it follows, as a necessary consequence of this proposition, that whether a man's absence from his family be for eight hours in each day, or six days in each week, if he has a family living in a neighboring state, for which he provides, to whom he resorts for comfort, relaxation and repose, and with whom he abides whenever the immediate demands of his business will permit, whenever sickness disables him from conducting that business, and when those days successively return on which business ceases, and man rests from labor, he resides in such neighboring state, and there, in every proper sense—as understood no less by those learned in the law, than by the common intelligence of every day life—is his *home*.² Therefore, a person doing business in New York, but who maintains his family in New Jersey, with whom he spends his nights and Sundays, is not a resident of this state, notwithstanding he owns property and keeps his bank account in this state.³ So, a person is not a resident, who does business in New York, and boards, as an ordinary guest, at a public hotel, during the week, but who maintains his family at his former residence, in Connecticut, and spends his Sundays

¹ Frost v. Brisben, 19 Wend., 11.

³ Id.; Baohé v. Lawrence, 17 How.,

² Barry v. Bockover, 6 Abb., 374. 554; Greatedon v. Morgan, 8 Abb., 64.

with them.¹ But, where a person domiciled in New York, removed to Connecticut, and called that his residence, but continued his business here, boarding all the week, but spending his Sundays with his family in Connecticut, it was held that he *was* a resident.² These last two cases cited, though very similar, are not necessarily conflicting. The facts are essentially different. In the latter case, it does not appear whether the attachment was issued under the revised statutes or the Code. The defendant had resided with his family and done business in New York city for years. His domicil remained there until a new one had been actually acquired. When his family removed to Connecticut, he still remained in New York only spending his Sundays in Connecticut. While in the former case, the defendant was domiciled in Connecticut, until he came to New York. He left his family and farm there, returning to them every Sunday, and remained at one time for nearly five months, during which time he was not in New York for a day. A person owning property and carrying on business in Canada, where his family is keeping house, but who is also carrying on business in this state and spends most of his time here, is not a resident.³ Likewise of a person, having a store of goods and doing business in this state, but who keeps a house in New Hampshire, where his wife and family reside, and in which he entertains his friends, and which he calls "home."⁴

17. But an immigrant who has left his native land, with no intention of returning, and who is living in this state without any determination to reside elsewhere, is a resident of the state.⁵ So, an inhabitant of this state, while

¹ *Chaine v. Wilson*, 16 How., 552;

1 Bosw., 673.

² *Towner v. Church*, 2 Abb., 299.

³ *Houghton v. Ault*, 16 How., 77;
Aff'd on appeal.

⁴ *Lee v. Stanley*, 9 How., 272.

⁵ *Heidenbach v. Schland*, 10 How., 477.

traveling in search of a place to tarry, or settle, with no place determined upon, is a resident, although he left the state with the intention of removing elsewhere. He would not lose his domicil here until he had acquired one elsewhere.¹ When C came to New York, on the 18th of October, and had not since left, and had previously hired a house and paid rent in advance, and on the 25th his family arrived there, it was held that he was a resident on the 21st of October.² So, where a person leaves the state for the purpose of opening a store in a western town, leaving his family and business here, and intending to return as soon as he has accomplished his purpose, he is a resident.³ So, where a person domiciled in New York moved to Connecticut, and called that his residence, but who continued his business here the same, boarding during the week, but spending his Sundays with his family in Connecticut, he was held not to have lost his domicil in this state.⁴

18. Where a person has two residences, for different seasons of the year, that will be his domicil, or legal residence, which he himself selects, or deems to be his *home*; or which appears to be the centre of his affairs, or where he votes, and exercises the rights and duties of a citizen.⁵

19. To sustain an attachment on the ground of non-residence against a person who had formerly a fixed habitation in this state, it must appear that such person has acquired a residence out of this state at the time the attachment issues. And, therefore, the enlistment of a person into the volunteer army or navy of the United States, and absence from the state in such service, do not render such person a non-resident.⁶

¹ Hegeman v. Fox, 31 Barb., 475.

² Matter of Crawford, 3 N. Y. Leg. Obs., 76.

³ Hurlbut v. Seeley, 11 How., 507.

⁴ Towner v. Church, 2 Abb., 299; see Chaine v. Wilson, 16 How., 552.

⁵ Douglass v. Mayor of N. Y., 2 Duer, 110; see also 27 Miss., 704.

⁶ Tibbitts v. Townsend, 15 Abb., 221.

20. Where the husband and wife are living separate, by the decree of a competent court, a change of the domicile of the husband does not change that of the wife.¹ (a)

21. An attachment may also issue against a defendant who has absconded or concealed himself;² but it must appear that he has departed from the state, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent.³ An absconding debtor has been defined to be one who, with intent to defeat or delay the demands of his creditors, conceals himself, or withdraws himself from his usual place of residence beyond the reach of their process.⁴ The term, as used in this chapter, is sufficiently defined by that part of section 229 above cited. The concealment which will justify an attachment is but a phase of absconding, and when they are connected together, as above, are regarded as undistinguishable. It has, therefore, been held that an affidavit, stating that the defendant has "absconded or concealed himself," does not exhibit two separate grounds for attachment, which, coupled by the disjunctive "or," would be vicious, but only one; for the terms are of equivalent meaning.⁵

22. To constitute an absconding, it is necessary that the party should have departed from the limits of this state; but it is not necessary that such departure should have been

(a) There are two or three of the earlier cases that seem to conflict with some of those cited above, but on a careful examination it will be found that the difference arises chiefly from the peculiar circumstances upon which the decisions rest, as well as from the necessity of the case. Such are the cases of *Haggart v. Morgan*, 4 Sandf., 198, 1 Seld., 422; the matter of *Thompson*, 1 Wend., 45, and *Frost v. Brisbin*, 19 Wend., 14. For an elaborate analysis and explanation of these cases, see the opinion of Justice James, in *Houghton v. Ault*, 16 How., 78.

¹ *Vischer v. Vischer*, 12 Barb., 640.

² Code, § 227.

³ Code, § 229.

⁴ *Drake on Attach.*, § 48.

⁵ *Drake on Attach.*, § 54, and cases; see also *Van Alstyne v. Erwine*, 1 Kernan, 381; *People v. Recorder of Albany*, 6 Hill, 429.

secret, as was required under the revised statutes, provided the intent either to defraud, or to avoid service, be shown to be existent at the time. As, where the defendant, who was on the verge of bankruptcy, openly and publicly left the state and went to England, intending to transact business abroad and then return, but with a view of having the explosion of his affairs take place in his absence, and of avoiding the importunity and proceedings of his creditors, an attachment was sustained. The defendant having confessedly departed the state, all that is required is for the court to be satisfied that such departure was with intent to avoid the service of process, or to defraud creditors.¹ But a departure from the state, with the intention of again returning, and without any fraudulent designs, is not absconding within the intendment of the law. Thus, where an attachment was granted upon an affidavit that the defendant had departed the state, with the intent of avoiding arrest, and of defrauding his creditors, and it subsequently appeared that he left his home to go to another place in the same state to sell some property; that, previous to his departure, the object of his journey was made known to his neighbors, and was generally understood, and that his departure was public and his return speedy, an attachment was superseded.² And, so where it satisfactorily appeared that the defendant had not absconded, although from the facts and circumstances his creditors were authorized to say that they *believed* he had done so.³

23. It is a general rule, and is undoubtedly true, under the Code, that one who resides abroad, and comes thence into this state for some purpose, and then returns to his domicile, cannot be considered an absconding debtor for so

¹ Morgan v. Avery, 7 Barb., 656.

² Matter of Chipman, 1 Wend., 66.

³ Matter of Warner, 3 Wend., 424.

leaving this state.¹ And in Tennessee, under a statute authorizing an attachment against *any* person absconding, or concealing himself, so that the ordinary process of law could not be served upon him, it was held, that only residents of the state, who absconded, were within the scope of the law, and that an attachment would not lie for that cause, against one who had not yet acquired a residence.²

24. The act of absconding is a personal act, and can be alleged only of him who has done it. A person can neither abscond, keep concealed, or be absent by proxy. Therefore, the fact that one member of a firm has absconded, will not justify an attachment against all the members on that ground.³

25. The concealment contemplated by the above section, is a debtor's placing himself designedly, so that his creditors cannot reach him with process, or so that he may defeat or delay their demands, and it matters not for how short a time, if the *intent* be clear. Thus a concealment for nine hours was held to be sufficient to authorize an attachment.⁴ Nor is it essential that the concealment be exclusively with intent to defraud creditors; but it must be with that intent or with intent to avoid the service of a summons. Either intent is sufficient to justify an attachment.⁵ And though an attachment be granted on an affidavit, alleging one of the intents, and it afterwards appears that the other intent was the proper one, the attachment will nevertheless be sustained. It is not necessary to prove the intent as averred, provided the evidence shows the other intent to have existed.⁶

26. Where an attachment was issued on affidavit, that

¹ Matter of Fitzgerald, 2 Caines, 318; Matter of Schroeder, 6 Cow., 608.

² Drake on Attach., § 49; citing Shugart v. Orr, 5 Yerg., 192.

³ Leach v. Cook, 10 Vermont, 239.

⁴ Cammann v. Tompkins, 1 Code R., N. S., 12.

⁵ Id., per Edmonds, J.; Genin v. Tompkins, 12 Barb., 265.

⁶ Morgan v. Avery, 7 Barb., 656.

the defendant was secreting himself, so that the ordinary process of law could not be served, and it was shown on behalf of the defendant, that he was temporarily absent from his place of abode, on a visit, in another county in the same state, that the plaintiff knew the defendant's intention to make said visit long before he started, and that his intention was also publicly and notoriously known, it was held to be unnecessary for the defendant to show that he communicated to the plaintiff his design to make the visit, and that it was sufficient if it were known in the neighborhood and could have been ascertained on inquiry.¹

27. Concealment, to authorize an attachment, must be with intent to defraud creditors, or to avoid the service of a summons. Therefore, one who conceals himself for the purpose of avoiding a criminal prosecution, was held not to be within the purview of the law.²

28. The fact of the concealment should be sworn to positively. It is not sufficient to swear that the plaintiff believes that the defendant keeps himself concealed to avoid the service of a summons. If the facts are alleged on belief, the grounds of such belief must be set out, so that the judge who issues the warrant may have such belief, and that the court may determine whether it is well founded. It should not state generally that diligent inquiry has been made for the defendant; that he was not to be found, nor could it be ascertained whither he had gone. But it should state where, when, and of whom the inquiry was made, so that the judge can determine whether the inquiry has indeed been conducted in good faith and with diligence.³ It is not essential that a sum-

¹ Drake on Attach., § 55, citing 6 Texas, 406.

² Drake on Attach., § 56, citing 8 Martin (Louisiana), N. S., 247.

³ St. Amant v. DeBeixedon, 3 Sandf., 703; Cammann v. Tompkins, 1 Code R., N. S., 12.

mons should have been issued and an attempt made to serve it. It is sufficient if the defendant has so disposed of himself, intentionally, that the summons could not have been served.¹

29. Where there may be one of two several intents coupled with an act, and an attachment is issued on an affidavit alleging the act with one of these intents, it will be sustained by proof of the other intent. As where an attachment was granted upon an affidavit alleging a departure from the state with intent to defraud creditors, it was held that it was not necessary to prove the *intent* as laid, provided the evidence show the other intent to have existed.²

30. Whenever any corporation, or person, has removed, or is about to remove, any of his, or its property from the state, with intent to defraud his, or its creditors, an attachment may issue, whether such defendant be a resident of this state or not.³

31. It is in accordance with the rulings under analogous provisions, as well as with the decisions in other states, that to justify an attachment for a removal of property, it must clearly appear that the act was done to defraud creditors; the mere fact of removal of property out of the state is insufficient. Thus, in Illinois, under a statute authorizing an attachment when the debtor "is about to remove his property from this state, to the injury of such creditor," a quantity of pig-iron belonging to the defendant was attached; evidence of the possession of other property, sufficient to pay the demand, was held admissible, as tending to show that the removal would not operate to the plaintiff's injury.⁴

32. The term "his property" means any property in

¹ Cammann v. Tompkins, *ut supra*.

² Morgan v. Avery, 7 Barb., 656.

³ Code, §§ 227, 229.

⁴ White v. Wilson, 10 Illinois, 21, cited in Drake on Attach., § 69.

defendant's possession, and to which he claims title, although his title may be imperfect, or clearly bad. It is the intent that justifies the attachment, and that is as manifest in concealing or removing embezzled property, as in concealing or removing that which is his own.¹ But the open removal of property, under the honest impression that it is exempt from execution, is not a fraudulent removal within the meaning of the non-imprisonment act, whose text is similar to the clause above.²

33. The question of intent is one of fact and not of law, and must be proved by the circumstances and incidents connected with the transaction. Where an attachment was sought under the act of 1842, on the ground that the defendant intended to remove his property out of the county with intent to defraud creditors, and the facts sworn to, were that the defendant had closed up his store, and immediately commenced packing his goods, and continued packing them until midnight; that his store was closed next morning, and that on the day previous he had removed his family without informing plaintiff who resided in the same house, the affidavit was held to be insufficient, and the attachment was withheld.³ But the rule is, perhaps, not so strict under the Code, as the sufficiency of the affidavit is not a jurisdictional question, and it is held that if it show enough to call upon the judge to exercise his judgment upon the weight of the evidence in establishing the grounds of the application, the attachment will not be set aside as irregular.⁴

34. An attachment may also be issued against any person or corporation who has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property, with intent to defraud his or its

¹ Treadwell v. Lawlor, 15 How., 8.

² Krauth v. Vial, 10 Abb., 139.

³ Mott v. Lawrence, 17 How., 559;
9 Abb., 196.

⁴ Furman v. Walter, 13 How., 348.

creditors, whether the defendant be a resident of this state or not.¹ The principles stated above as to the proof of intent, are equally applicable to this clause.

35. A mere threat to make an assignment of property, granting preference to others, unless the plaintiff would accept certain terms, made in words which may be construed to mean that he would make a lawful assignment, is not, in itself, proof of a fraudulent intent sufficient to authorize an attachment.² As where the defendant had said to plaintiff that he wished to compromise with his creditors, and that if the plaintiff did not consent to take 33½ per cent, he would go home and make an assignment of his property, and that he would put his property out of his hands sooner than pay him more than 33½ per cent; and the defendant did subsequently make a legal assignment; an attachment was refused.³ Nor does it alter the rule that the defendant had originally promised to give the plaintiff collateral security for his debt, if it is not shown that such security was to have been given out of the assets of the debtor.⁴ For the debtor has the legal right to dispose of all his property to one or more preferred creditors, without fraud, and without incurring any liability to attachment.⁵

36. But the debtor will not be allowed to use his power to assign in order that he may intimidate his creditors from pursuing the remedies allowed by law to collect their debts, without being chargeable with fraudulent intent. As where the defendant threatened that, if he were sued, he would make an assignment, and the plaintiff would not get any thing, and that he would do business in the name of another; and the defendant, on a motion to set

¹ Code, §§ 227, 229.

² Wilson v. Britton, 26 Barb., 562;

6 Abb., 97.

³ Id.

⁴ Dickerson v. Benham, 20 How., 343; 12 Abb., 158.

⁵ Id.; Rigney v. Tallmadge, 17 How., 556.

aside the attachment, claimed that he had property enough to pay all his debts, if his creditors had given him a little more time; it was held that the defendant's threat, in connection with his ability to pay all his debts, was evidence of an intent to defraud creditors, and the motion to set aside the attachment was refused.¹ So, where a debtor refused to pay his note on demand, and was then told by the holder that he would be sued, and the debtor, thereupon, threatened that if he was sued he would turn over all his property, and that the holder would not get a cent, the property of the defendant was held liable on such threat to an attachment.² But in these cases, it will be observed, the intent was not manifest by the simple threat to assign, but by that in connection with other contemporaneous or subsequent facts.

37. So, where a debtor has made an assignment for the benefit of creditors, which is in fact fraudulent, though valid upon its face, an attachment will be granted.³ But property in the hands of an assignee for the benefit of creditors, cannot be attached on the ground of alleged fraudulent transactions of the assignor prior to the time of the assignment.⁴ Under the fifth clause of section 179, the language of which is similar to that of the clause under consideration, it was held, that the making of an assignment *constructively* fraudulent, was not in itself a ground of arrest, a fraudulent intent must be shown.⁵ But, if after an assignment for the benefit of creditors, the assignor retain and sell a part of the property assigned, the transaction is fraudulent.⁶ A mere refusal to pay, or provide for a debt, however gross in its nature,

¹Gasherie v. Apple, 14 Abb., 64.

²Livermore v. Rhodes, 27 How., 506.

³Skinner v. Oettinger, 14 Abb., 109; Rinehey v. Stryker, 26 How., 75.

⁴Belmont v. Lane, 22 How., 365.

⁵Birchell v. Straus, 28 Barb., 293; 8 Abb., 53; Spies v. Joel, 1 Duer, 669.

⁶McButt v. Hirsch, 4 Abb., 441.

does not necessarily show, or tend to show, intent of a fraudulent disposition.¹

38. By the term "property" is meant any property in the defendant's possession and to which he claims title, although his title is imperfect or bad. The attachment lies if the defendant has secreted or is about to secrete any single piece of his property, and extends to all property of every kind, because the single act shows a readiness and intent to extend the offense as far as may be necessary to promote his fraudulent design; and this design is as manifest in concealing embezzled property as in concealing that which is lawfully his.²

39. A mere omission to state, upon the face of a deed of conveyance, the object or purpose for which it is made is not conclusive evidence of fraud, even though such deed be given under suspicious circumstances. The purpose and consideration of the conveyance may be shown by affidavits and the apparent fraud thereby negatived. As where a deed of property, apparently absolute was made to a third person as security for certain liabilities, which, from the omission to state the purpose for which it was made, and other circumstances, was suspicious, and an attachment was therefor granted. The defendant satisfied the court, by affidavits that it was made for honest purposes, in order to protect the grantee for his liability as security, fairly entered into, and the fraudulent intent was thereby disproved.³ Nor, is a neglect to defend an action, by means of which property is taken, a fraudulent disposition of property, where no fraud or collusion is shown.⁴

40. Under the non-imprisonment act of 1831, the language of which is similar to the above, where it appeared that the defendant had left the state, two months before,

¹ *Hathorn v. Hall*, 4 Abb., 227.

² *Treadwell v. Lawler*, 15 How., 556.
8, per Mitchell, J.

³ *Rigney v. Talmadge*, 17 How., 556.

⁴ *Id.*

and had gone to Canada with intent to remain there, and had taken with him some portion of his personal property; that he had no family and but little property; that he was offering his property in this state for sale; that he told the plaintiff that "he would be damned glad if he ever got his pay of him;" that no civil process could be served on him, because he kept out of the state, and that he refused to pay any thing on plaintiff's debt. It was held, that these facts proved a strong case of *intent* to dispose of property to defraud creditors.¹ So, in Missouri, under a statute allowing an attachment where the defendant "had fraudulently conveyed, assigned, removed, concealed and disposed of his property and effects, so as to hinder, defraud and delay his creditors," it appeared that the defendant, being indebted to the plaintiff and others, was permitted by them to take a certain amount of goods, under a written agreement to make a weekly account of his sales, and pay over the proceeds, after deducting the charges, and that he made on one occasion a considerable sale of goods for cash, of which he made no return. It was held, that the money for which the goods were sold by the defendant, was as capable of being concealed as the goods were, and that the concealment of the money was not less a fraud, because it was accompanied with a concealment and misrepresentation of facts and circumstances.²

41. The facts and circumstances tending to show the fraudulent disposition of the debtor's property should be sworn to by some person familiar with them. Where the affidavit did not state, upon actual knowledge, any material fact amounting to legal evidence of such purpose by the defendant, but stated all upon information and

¹ Rosenfield v. Howard, 15 Barb., 546.

² Powell v. Mathews, 10 Missouri, 49; cited in Drake on Attach., § 73.

belief, an attachment issued thereon was set aside as irregular.¹

42. Where one of several joint debtors absconds, or is a non-resident, his interest in the joint property, as well as his individual property may be attached. But in such case, the attachment will not bind the joint property of all the partners, but only the interest of the party against whom the attachment issues. Nor is the absence, or absconding, of one joint debtor sufficient to authorize an attachment against the property of all.² There is a conflict in the decisions on the question, as to whether under an attachment against one member of a copartnership, the partnership property can be seized. In *Abels v. Westervelt*, it was held, at general term, that the copartnership property could not be seized and sold under such attachment. That it is only the interest in the property of the partner attached that can be seized and sold, and that his *interest* is his share in the *surplus* of the property after paying the partnership debts, and also that the other partners have a right as against such an attachment to retain the property for the purpose of satisfying the partnership debts;³ and the decision in *Stoutenburgh v. Vandenburg*, was similar.⁴ But in *Goll v. Hinton*, the decision in the latter case was overruled, and it was there held that upon an attachment against one of several copartners, the sheriff may seize the leviable property of the copartnership and take it into possession and sell the defendant's interest insomuch thereof as is necessary, and further that the analogy holds between attachments and executions, and whatever property the sheriff may take under the latter process he may seize and take under

¹ *Hill v. Bond*, 22 How., 272; *Brewster v. Tucker*, 13 Abb., 76.

² *Stoutenburgh v. Vandenburg*, 7 How., 233; *Brewster v. Honigs-*

bergher, 2 Code R., 50; *Baird v. Walker*, 12 Barb., 300.

³ 24 How., 284.

⁴ 7 How., 229.

the former.¹ The case of *Goll v. Hinton* was referred to and approved in *Smith v. Orser*, and the court held in that case, that where an attachment is issued against one or more members of a firm, the sheriff must proceed to serve it upon the interest of the defendants in the property owned by them jointly with others, in the same manner that he is required to do under an execution.² In *Drake on Attachments* it is said that an interest which a defendant may have with others may be attached, and the property may be seized and removed, notwithstanding the rights of other joint owners, arising out of an agreement between the owners, may thereby be impaired. In such case, only the individual interest of the defendant can be sold, and the purchaser becomes a tenant in common with the other cotenants.³ But in an action against a special partner, his interest in the copartnership cannot be attached.⁴

43. It was early held, in this state, that the statute respecting absent debtors did not warrant proceedings by attachment against heirs, executors, trustees, or others claiming merely by right of representation; ⁵ and, more recently, that proceedings by attachment, against executors, are inapplicable for the purpose of compelling the settlement of the estate of the testator, or for enforcing payment of an individual demand, contracted by the testator, when the executors are not charged with any breach of duty, except a neglect to pay the debt.⁶ But if an executor or administrator, in the course of the discharge of his duties as such, place himself in a position where he becomes, by principles of law, personally liable,

¹ *Gall v. Hinton*, 8 Abb., 120.

² 43 Barb., 187.

³ § 248, *Mersereau v. Norton*, 15 John., 179; *Phillips v. Cook*, 24 Wend., 389.

⁴ *Harris v. Murray*, 28 N. Y. R.,

574; see further on this subject post, sec. v., pl. 17.

⁵ *Jackson v. Walsworth*, 1 John.'s Cases, 372; *Matter of Hurd*, 9 Wend., 465.

⁶ *Metcalfe v. Clark*, 41 Barb., 45.

he may be proceeded against personally, and need not be named as executor or administrator.¹

44. There is no statutory provision prohibiting both an attachment and an order of arrest from being issued in the same action. Thus, where an order of arrest had been made upon affidavits showing the obtaining of the goods on false pretenses, an attachment was also issued, upon the ground of fraudulent disposition of property.²

45. It is provided, by a rule of the court, that "in actions for the recovery of money only, when the summons has been served by publication, under section 135 of the Code, no judgment shall be entered, unless the plaintiff, at the time of making the application for judgment, shall show by affidavit that an attachment has been issued in the action and levied upon property belonging to the defendant, which affidavit shall contain a specific description of such property, and a statement of its value, and shall be attached to and filed with the affidavits of publication."³ Where a judgment was procured by publication, and no property attached, the court held that the judgment was irregular, in consequence of the plaintiff's omission to attach the defendant's property, as it could, in no event, affect any property of the defendant, except such as had been taken by virtue of an attachment regularly issued in the action.⁴

46. The plaintiff may have the property attached at the time of issuing the summons, or at any time afterwards. For the purposes of this section, the action will be deemed commenced when the summons is issued, provided, however, that personal service of such summons shall be made, or publication thereof commenced, within thirty days.⁵ The summons is "issued," within the meaning of the

¹ *Matter of Galloway*, 21 Wend., 32.

² *Bebee v. Rogers*, Superior Court, 1859, cited in *Hoff. Pro Rem*, 414.

³ Rule 25.

⁴ *Warren v. Tiffany*, 17 How., 106.

⁵ See § 227, as amended, 1866.

statute, when it is made out and placed in the hands of a person authorized to serve it, with a *bona fide* intent of having it served.¹ The court acquires jurisdiction from the time of the service of the summons or the allowance of the attachment.² The current of decisions, prior to the amendment of the above section in 1866, was to the effect that the attachment could not be served before the service of the summons; but such amendment has overruled those decisions, so that it would be useless to refer to them.³ It is probably not essential that the summons be delivered to the sheriff before the attachment is issued; but it should be made out and presented to the judge together with the other papers on which the application is based.⁴

¹ Mills v. Corbett, 8 How., 500.

² Code, § 139.

³ See 28 N. Y. R., 659; 2 Sandf.,

661; 3 Bosw., 626; 16 Abb., 246;
note.

⁴ See Gould v. Bryan, 3 Bosw., 626.

SECTION II.

THE AFFIDAVIT.

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| 1. § 229. In what cases warrant may be issued ; affidavits to be filed.
2. The affidavit must be positive.
3. Facts, how to be stated.
4. Intent may be stated on belief; and in the alternative.
5. Words of the statute insufficient, but should be included. | 6. Cause of action, how stated.
7. Entitling affidavit.
8. Affidavit, by whom made.
9. Proceeding cannot be reviewed collaterally.
10. Amending affidavit.
11. Filing affidavits. |
|---|--|

1. "The warrant may be issued whenever it shall appear, by affidavit, that a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof, and that the defendant is either a foreign corporation or not a resident of this state, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein, with like intent; or that such corporation or person has removed, or is about to remove, any of his or its property from this state, with intent to defraud his or its creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of or secrete, any of his or its property, with the like intent, whether such defendant be a resident of this state or not. It shall be the duty of the plaintiff procuring such warrant, within ten days after the issuing thereof, to cause the affidavits on which the same was granted to be filed in the office of the clerk of the county in which the action is to be tried."¹ The first division of this section, down to "keeps himself concealed therein, with like intent," was

¹Code, § 229.

in the Code of 1849. The second, giving the remedy for removing or concealing property, was added in 1857. And the third, or concluding paragraph, in 1860.

2. In a remedy of so grave a character as the attachment, which ties up the entire property of a party, pending a suit, the affidavit upon which the proceeding is authorized should be explicit, and made, in general, upon positive knowledge of the deponent, so far, at least, as to establish a *prima facie* case.¹ Where any facts are alleged upon information and belief, the source of such information should be set forth. And it must be observed that there is a distinction between *stating* the source, and *setting it forth*. If the affiant's knowledge is derived from letters, papers, or other documents, in his possession, or which it is in his power to procure, it would not be sufficient to state that the knowledge or information was derived from such papers; but the papers themselves, or copies of them, should be presented.² Though facts may sometimes be alleged on information and belief, yet an affidavit on mere unsupported hearsay will be insufficient, and an attachment granted thereon will be set aside.³ Where the affidavit of the person, from whom is derived the information on which the application is based, cannot from any cause, be obtained, the reasons why it cannot be obtained, together with a detail of the information derived from such person, should be presented to the judge, so as to satisfy him that the facts exist, on which the attachment is sought; and that the best evidence in the plaintiff's possession has been produced to establish them.⁴ (See forms Nos. 90 to 94).

3. It is the duty of the judge to determine whether a

¹ St. Amant v. DeBeixedon, 3 Sandf., 703; Hill v. Bend, 22 How., 272; Mott v. Lawrence, 17 How., 559; Brewer v. Tucker, 13 Abb., 76.

² See De Nierth v. Sidner, 25 How., 419.

³ Hill v. Bond, 22 How., 272.

⁴ Id.

sufficient cause of action exists, and whether the case is one of those in which an attachment may issue; and to enable him to do this, the facts constituting the cause of action, and those constituting the grounds for an attachment, should be plainly and fairly stated. It would be obviously insufficient to state simply that a cause of action exists, and that the defendant is a non-resident, or that he has departed from the state with intent to defraud creditors; or that he has disposed of his property with like intent, without stating any of the facts from which these conclusions are derived. Such a course would be substituting the conclusions of the affiant for those of the judge.¹

4. But as the *intent* of the defendant is not a subject of positive knowledge, but can only be inferred from his words and acts, therefore the *intent* may be alleged on belief; but the words or acts from which such intent is to be inferred, should be specifically set forth, that the judge may be able to determine whether such inference be proper. Where the intent is positively sworn to, the court will regard the allegation as made on belief, and will require the facts to be set forth.² And where the affidavit sets forth facts, which, coupled with either of two several intents, would justify an attachment under the above section, and the attachment is granted upon the averment of the facts with one of those intents, it will be sustained by proof of the other intent. Thus, under that clause of the above section which provides that an attachment may issue when it shall appear that the defendant "has departed from the state with intent to defraud his creditors, or to avoid the service of a summons," an

¹ See *Frost v. Willard*, 9 Barb., 440, *Cammann v. Tompkins*, 1 Code R., N. S., 12; *Genen v. Tompkins*, 12 Barb., 265; the dictum in *Furman v. Walter*, 13 How., 354, to the contrary

can hardly be considered as an authority.

² *Frost v. Willard*, 9 Barb., 446; *Furman v. Walter*, 13 How., 355.

attachment was obtained upon an affidavit alleging a departure, with intent to defraud creditors. The defendant moved to set it aside, and adduced evidence to disprove the alleged intent. The court held that it was not necessary to prove the intent as averred, provided the evidence showed the other intent to have existed.¹ Where, under a given statement of facts, it is doubtful which intent should be coupled therewith, the affidavit may charge the intent in the alternative.²

5. While it would not be sufficient to make the allegations in the bare words of the section, without facts and circumstances to confirm them, yet such words of the section should be alleged, distinctly and positively, either preliminary to, or at the conclusion of, the statement of facts.

6. It must be made to appear, that a cause of action exists against the defendant, specifying the amount of the claim and the grounds thereof. The cause of action need not be stated with the same fullness and precision that would be required in a pleading; but it should be so stated that the judge can readily determine whether or not a cause of action really exists. And the amount of the claim must be specified. Where the plaintiff was unable to state the amount, without an accounting between the parties, the attachment was set aside.³ Where an affidavit alleged "that the demand arose upon a judgment, which, deponent has been informed and believes, was obtained in or about the year 1842, by this deponent, etc., against said, etc., on a promissory note, etc.," it was held that the words "informed and believes," referred to the date only, and not to the existence of the judgment.⁴

¹ Morgan v. Avery, 7 Barb., 656.

² Van Alstyne v. Erwine, 1 Kern., 331; Cammann v. Tompkins, 1 Code R., N. S., 12; Genin v. Tompkins, 12 Barb., 265.

³ Ackroyd v. Ackroyd, 20 How., 93; 11 Abb., 345.

⁴ Donnelly v. Corbett, 3 Seld., 500.

7. It is not necessary to entitle the affidavit; but if it is not entitled, it must intelligibly refer to the action in which it is made.¹ Where an affidavit had no title, did not refer to the action, and did not mention the name of the plaintiff or defendant, nor whether deponent was plaintiff or defendant, and was so indefinite that it could be used in one action as well as another, it was held entirely insufficient to sustain any proceeding.²

8. The affidavit may be made by the plaintiff, or by any other person, having knowledge of the facts. It should be made by some one having actual knowledge; and where the facts are not all within the knowledge of one person, collateral affidavits may be used.³

9. The sufficiency of the affidavit upon which an attachment under the Code issues, is not a jurisdictional question; and, therefore, the proceedings cannot be reviewed and set aside in a collateral matter.⁴ But, where the moving affidavit is clearly insufficient, it may be set aside, on a motion in the action for that purpose.⁵

10. In *Furman v. Walter*, it is said that "it would seem that the attachment and original affidavits, being proceedings in the action, come within the 173d section of the Code, which authorizes the court, in furtherance of justice, to amend any pleading or proceeding by inserting material allegations therein."⁶

11. The last clause of the above section makes it the duty of the plaintiff procuring the attachment, within ten days after the issuing thereof, to cause the affidavits on which the same was granted to be filed in the office of the

¹ Code, § 406.

² *Burgess v. Stitt*, 12 How., 401.

³ See *St. Amant v. DeBeixcedon*, 3 Sandf., 703; *Hill v. Bond*, 22 How., 272; *Morgan v. Avery*, 7 Barb., 658.

⁴ In the matter of *Griswold*, 13

Barb., 412; *Furman v. Walter*, 18 How., 349.

⁵ *Conklin v. Dutcher*, 5 How., 386; *Hill v. Bond*, 22 How., 272; *Burgess v. Stitt*, 12 How., 401.

⁶ 18 How., 349.

clerk of the county in which the action is to be tried. But by a rule of the supreme court, the affidavits upon which an attachment has been granted, must be filed by the plaintiff's attorney, within *five* days after the same has been granted, or in default thereof, the defendant may move the court to vacate the proceedings for irregularity, with costs.¹ But where a party inadvertently omits to comply with this rule, the court may undoubtedly relieve him upon or without terms.² (For forms of affidavit, see appendix Nos. 90 to 94).

¹ Rule 4.

² See *Leffingwell v. Chave*, 19 How., 55; 10 Abb., 472.

SECTION III.

THE UNDERTAKING.

- | | |
|---|---|
| 1. § 230. Security on obtaining the warrant. | 5. When surety becomes incompetent, court may substitute. |
| 2. The undertaking, its form and execution. | 6. Undertaking to be filed. |
| 3. The amount for which it must be given. | 7. Defects in, do not discharge sureties. |
| 4. Plaintiff need not join in; how sureties to justify. | 8. Who may bring action on. |
| | 9. For what damages sureties liable. |
| | 10. Obligation continues on appeal. |

1. "Before issuing the warrant, the judge shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment, or the attachment be set aside by the order of the court, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be, at least, two hundred and fifty dollars."¹ In 1862 the words "or the attachment be set aside by the order of the court" were added; otherwise the section has remained unaltered.

2. The undertaking must be in writing, but no particular form is prescribed; and a substantial compliance with the language of the section is sufficient. It will be good even made in the form of a penal bond, provided it contain the conditions here required, and be otherwise regular.² But the proper course is to follow the exact wording of the section. Before the undertaking can be received or filed, it must be duly proved or acknowledged

¹ Code, § 230.

² Conklin v. Dutcher, 5 How., 386;
1 Code R., N. S., 49.

in like manner as deeds of real estate;¹ and after it has been passed upon by the judge, his approval must be indorsed thereon. But where the undertaking is otherwise sufficient, and there has been an omission to acknowledge it, it may be amended in that respect and acknowledged, *nunc pro tunc*;² or, if improperly executed, in any respect, it can be amended on motion to the court.³ (See form No. 95).

3. The sum, for which the undertaking must be given, must be at least \$250; and in ordinary cases this sum would probably be sufficient. But the judge may require more, and should do so, where it is probable that that amount will not cover all the costs and damages which the defendant may recover, if successful. The plaintiff should take the precaution to insert a sum sufficiently large to fully cover the probable amount of costs and damages which the defendant may sustain. But if defective in this respect, the court may allow an amendment, by filing a new undertaking.⁴ The defendant is probably the only party that could take advantage of any defect or insufficiency in the undertaking. Such is the rule in several of the states.⁵

4. The plaintiff need not join in the undertaking;⁶ but there must be, at least one surety; and there need be only one, provided the judge deem that sufficient. The sureties should justify, by an affidavit attached to or indorsed upon the undertaking, to the effect that they are householders or freeholders within the state, and worth severally the amount specified in the undertaking over and above all their debts and liabilities. But any omis-

¹ Sup. Court, Rule 6.

² Conklin v. Dutcher, 5 How., 386.

³ Bellinger v. Gardner, 12 How., 381.

⁴ Kissam v. Marshall, 10 Abb., 424.

⁵ See Drake on Attach., 2d ed., §143.

⁶ See Askins v. Hearn, 3 Abb., 184; Leffingwell v. Chave, 19 How., 54; 10 Abb., 472.

sion or irregularity in the justification, may be amended on motion.¹

5. Should one of the sureties to the undertaking become insolvent, or otherwise incompetent, the court has discretionary power to require a substitute.²

6. When the undertaking has been properly executed and acknowledged, the judge must indorse his approval thereon, and the same must be forthwith filed by the plaintiff's attorney, with the clerk of the proper county; or in case it be not filed, within five days from the granting of the attachment, the defendant shall be at liberty to move the court to vacate the proceeding for irregularity, with costs, as if no undertaking had been given.³ But when the party inadvertently omits to file the undertaking within the five days, the court may relieve him with or without terms.⁴

7. It is laid down by Mr. Drake, in his excellent work on Attachments, that the errors and defects of attachment bonds, however they might affect the attachment proceedings, do not interfere with the liability of the obligors to the defendant. Upon them the obligation continues, though the attachment might have been vacated because of the insufficiency or irregularity of the instrument.⁵ And the same rule would no doubt apply to undertakings given as in this chapter.

8. As a general rule, the only party who can maintain an action on an attachment undertaking, is the defendant. The bond is not required for the protection of the officer executing the attachment, nor for the indemnification of a third party, whose property may be wrongfully attached, but simply as a measure for the benefit of the party against whom the writ issues.⁶

¹ Conklin v. Dutcher, 5 How., 386; Bellinger v. Gardner, 12 How., 381.

² Willett v. Stringer, 15 How., 310; 6 Duer, 686.

³ Sup. Court, Rule 4.

⁴ Leffingwell v. Chave, 19 How., 55; 10 Abb., 472.

⁵ Drake on Attach., 2d ed., § 150.

⁶ Drake on Attach., 2d ed., § 162.

9. The damages for which the plaintiff will be liable under the undertaking, are the natural, proximate, legal result, or consequence of the wrongful act. Remote or speculative damages — such, for instance, as result from injuries to credit and business — cannot be recovered. If the property was taken out of the defendant's possession, he may be entitled to the value of it, or to loss occasioned by his being deprived of the use of it pending the attachment, or by an illegal sale of it, or by injury thereto, or loss or destruction thereof.¹ Where the attachment is a nullity the plaintiff is responsible for all damages resulting from the taking and keeping of the goods, and from the negligence of the sheriff in executing the same.² So, where the attachment is set aside for irregularities, it will afford no justification to the party at whose instance it was issued for acts done under it, and he becomes a trespasser *ab initio*, and the return of the property will only go in mitigation of damages.³

10. The undertaking is not limited in its obligation to the court in which the attachment proceedings were instituted, but extends to the final determination of the proceeding. So, that if an appeal be taken, the liability of the sureties continues until the final result.⁴ (For form of undertaking, see appendix No. 95).

¹ See Drake on Attach, 2d ed., § 175; see also Dunning v. Humphrey, 24 Wend., 31; Groat v. Gillespie, 25 Wend., 383.

² Kerr v. Moffatt, N. Y. Trans., Dec. 23, 1859; see Kerr v. Mount, 28 N. Y. R., 659.

³ Kerr v. Mount, *supra*.

⁴ Bennett v. Brown, 31 Barb., 158; 20 N. Y. R., 99; Ball v. Gardner, 21 Wend., 270.

SECTION IV.

THE WARRANT, BY WHOM GRANTED, AND WHAT TO CONTAIN.

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|---|--|
| <ol style="list-style-type: none">1. § 228. Warrant, by whom granted.2. Application, how made.3. When granted by a county judge.4. When warrant may be granted.5. Judge related to either party cannot grant.6. When proceedings may be continued before another judge.7. § 231. <i>Warrant, to whom directed, and what to contain.</i> | <ol style="list-style-type: none">8. Merely an order of the judge.9. Must state amount of plaintiff's demand.10. Several warrants, when issued.11. Must have signature of judge.12. Formal defects in warrant amendable.13. Within what time motion for attachment to be decided. |
|---|--|

1. "A warrant of attachment must be obtained from a judge of the court in which the action is brought, or from a county judge."¹

2. The affidavit and undertaking, having been prepared and executed, are to be presented to the judge from whom the remedy is sought, also the warrant or warrants to which his signature is desired. If satisfied with the papers, the judge will indorse his approval on the undertaking, sign the warrant and return all the papers to the plaintiff's attorney, who should at once file with the county clerk, the affidavit and undertaking, and deliver the warrant to the sheriff to whom it is directed.

3. When the attachment is granted by a county judge, it must be by the judge of the county in which the action is triable, or by the county judge of the county in which the attorney for the moving party resides;² and it can only be granted on an *ex parte* application, as a county

¹ Code, § 228.

² Code, §§ 401, sub 3; 403.

judge has no power to hear a motion on notice, in an action pending in the supreme court.¹

4. Prior to the recent amendment of section 227, the superior court held that unless the court had already acquired jurisdiction of the controversy, by service, that an attachment issued by it would be void.² But, since such amendment, service is no longer essential to give jurisdiction, as the action will be deemed commenced when the summons is issued, provided personal service of such summons shall be made, or publication thereof commenced, within thirty days.³

5. A judge related to either party by affinity within the degree which would exclude him as a juror, cannot grant an attachment between the parties. Such is the rule as to injunctions, and it undoubtedly holds good as to attachments.⁴

6. When issued, the attachment is the act of the court, and not of the individual judge who grants it; and, therefore, it does not die when the latter's term of office expires; but the proceeding may be continued with the same effect, before another judge.⁵

7. "The warrant shall be directed to the sheriff of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses; the amount of which must be stated in conformity with the complaint, together with costs and expenses. Several warrants may be issued at the same time, to the sheriffs of different counties."⁶

¹ *Merritt v. Slocum*, 3 How., 309;
Rogers v. McElhone, 20 How., 441,
12 Abb., 292.

² *Fisher v. Curtis*, 2 Sandf., 660;
Kerr v. Mount, 28 N. Y. R., 659.

³ Code, § 227, as amended, 1866.

⁴ See *N. Y. & N. Haven R. R. v. Schuyler*, 28 How., 187.

⁵ *Davis v. Ainsworth*, 14 How., 346.

⁶ Code, § 231.

The clause commencing "or so much thereof" was inserted in 1851. (See form No. 96).

8. The warrant was formerly held to be process, and like the subpœna, execution, etc., was required to issue in the name of the people, under the seal of the court.¹ But it is now held to be merely a judge's order, requiring only the signature of the judge, without any formal *teste*, signature of the clerk, or seal. The signature of the plaintiff's attorney should, however, be required. It is also held that no return day need be inserted in the warrant.²

9. The warrant must state the amount of the plaintiff's demand, as that alone forms a guide to the sheriff, as to the amount of property to be taken. But any defect in this respect, may be remedied by amendment.³

10. Should there be property in more than one county, several warrants may be had; but each should be an original, and have the judge's signature thereto. Should property of the defendant be discovered, after the issuing of the attachment, in a county to which no warrant has been issued, it is probable that, to obtain a new or supplemental warrant, a new and original application would be necessary. But the Code has made no provision for such a contingency, and there is no decided case on the subject; and it might possibly be sufficient to present the original papers a second time, to the same judge.⁴

11. The signature of the judge who grants the warrant of attachment is indispensable to its validity; without it there could be no assurance to the officer who executed it that it was genuine. But the same reason does not exist for adding the judge's signature to the copy of the warrant,

¹ Cammann v. Tompkins, 1 Code R., N. S., 12; Morgan v. Avery, 7 Barb., 656.

² Genin v. Tompkins, 12 Barb., 265.

³ Kissam v. Marshall, 10 Abb., 424; Cornish v. Cole, cited in Hoff. Pro Rem., 425.

⁴ 1 Whitt. Practice, p. 507.

and if the copy is served without such signature, it will not be an irregularity.¹

12. Any formal defect in the warrant may be remedied by amendment, on motion to the court.²

13. Whenever a motion shall be made to obtain a warrant of attachment, it shall be the duty of the judge before whom such motion is made, to render and make known his decision on such motion within twenty days after the day upon which such motion shall or may be submitted to him for his decision.³

¹ *Greenleaf v. Mumford*, 30 How., 30.

² *Kissam v. Marshall*, 10 Abb., 424.

³ Code, § 401, sub 8.

SECTION V.

WHAT PROPERTY MAY BE ATTACHED.

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| <ol style="list-style-type: none"> 1. § 234. Interest in corporations or associations, liable to attachment. 2. What property may be attached. 3. Whatever may be seized on execution. 4-8. What property is exempt from attachment. 9. Right of exemption, how waived. 10. What right attaching creditor acquires in attached property. 11. Property in possession of third persons, having lien, how attached. 12. Lien must be valid and subsisting. 13. Property in possession of factor having lien, cannot be attached for his debts. 14. Property in custody of the law, not liable. 15. The interest of a chattel mortgagor, when liable. | <ol style="list-style-type: none"> 16. Contingent interests not attachable. 17. Partnership property, when liable in action against one partner. 18. Interest of a special partner. 19. Of tenants in common. 20. Partnership books and papers, when liable. 21. Partnership credits and choses in action. 22. Debts due from one non-resident to another, when liable. 23. Proceeds of property fraudulently assigned. 24. Sheriff may attach property fraudulently assigned. 25. Real estate subject to attachment. 26. What is included in the term "real property." |
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1. "The rights or shares which such defendant may have in the stock of any association or corporation, together with the interest and profits thereon, and all other property in this state, of such defendant, shall be liable to be attached and levied upon and sold to satisfy the judgment and execution."¹ This has remained unchanged since 1849.

2. By the revised statutes it is provided that all the real and personal estate of the defendant, except articles exempt from execution, is liable to be attached, including money, bank notes, all books of accounts, vouchers, and papers relating to his property, debts, credits and effects, and all evidences of his title to real estate.²

3. It may be stated, as a general rule, that whatever

¹ Code, § 234.

² 3 R. S., 5th ed., 80.

property may be seized and sold under an execution, may be attached; and, in addition to this, all shares or rights in any association or corporation, and choses in action, although not subject to levy under an execution.¹

4. The following property is exempt, under the revised statutes, from levy and sale on an execution against the owner when he is a householder: A "householder" is the head, master, or person who has charge of and provides for a family.² It has been held that one who rents a house, and keeps boarders and servants, is a householder, though he has neither wife nor child for whom he provides.³ And where a husband has left the state, leaving a wife and children together, she will be deemed a householder. A householder does not lose the character of housekeeper by ceasing temporarily to keep house and storing his property, with a view to retake it again and renew housekeeping.⁴

5. The articles of personal property thus exempt are: 1. All spinning wheels, weaving looms, and stoves put up or kept for use in any dwelling house. 2. The family Bible, family pictures and school books used in the family of such person, and books not exceeding in value fifty dollars, which are kept and used as a part of the family library. 3. A seat, or a pew occupied by such person or his family in a house or place of public worship. 4. All sheep to the number of ten, with their fleeces, and the yarn or cloth manufactured from the same; one cow, two swine, the necessary food for them; all necessary pork, beef, fish, flour and vegetables actually provided for family

¹ Patterson v. Perry, 10 Abb., 93; N. Y. Leg. Obs., 248; Van Vechten Goll v. Hinton, 8 id., 120; Frost v. v. Hall, 14 How., 436.

Mott, 34 N. Y. R., 253.

² Griffin v. Sutherland, 14 Barb., 456.

³ Hutchinson v. Chamberlin, 11

⁴ See Crocker on Sheriffs, citing 18 John., 400; 14 Barb., 456; Voorhies's Code, § 291, note.

use, whether gathered or growing,¹ and necessary fuel for the use of the family for sixty days. 5. All necessary wearing apparel, beds, bedsteads and bedding for such person and his family; arms and accoutrements required by law to be kept by such person; necessary cooking utensils; one table, six chairs, six knives and forks, six plates, six tea cups and saucers, one sugar dish, one milk pot, one tea pot and six spoons; one crane and its appendages, one pair of andirons, and a shovel and tongs. 6. The tools and implements of any mechanic, necessary to the carrying on of his trade, not exceeding twenty-five dollars in value.²

6. In addition to the above, there are also exempt, under section 1 of chapter 157, of 1842, amended by chapter 134, of 1859, the following: Necessary household furniture and working tools, and team, owned by a person being a householder, or having a family for which he provides, to the value of not exceeding two hundred and fifty dollars; and, in addition thereto, there shall be also exempted from such levy and sale the necessary food for said team, for a period not exceeding ninety days; provided that such exemption shall not extend to any execution issued on a demand for the purchase money of such furniture, or tools, or team, or the food for said team, or the articles now enumerated by law.

7. One sewing machine, and the appurtenances thereto belonging, is, likewise, exempt.³ So is land set apart for, and which has been actually used as, a burying ground, not exceeding one-fourth of an acre in extent, and on condition that the owner has recorded a description of the property in the manner prescribed.⁴ And, lastly, a

¹ *Carpenter v. Herrington*, 25 Wend., 370.

² 3 R. S., 5th ed., 646.

³ Laws of 1860, chap. 152.

⁴ Laws of 1847, chap. 85; see *Cox v. Stafford*, 14 How., 519.

homestead to the value of \$1,000, subject to certain conditions and requirements prescribed by law.¹

8. The professional books necessary to a professional man, who supports a family by the practice of his profession, are exempt from execution as a part of the family library. Also, the surgical instruments of a physician are exempt as his "tools."² So, the horse of a country physician, whose patients reside at too great a distance to permit his visiting them on foot, is exempt as a necessary team;³ also, the buggy wagon used in his professional business.⁴ A watch or clock may be exempt, either as necessary household furniture or as a working tool.⁵ The one-horse harness and cart of a carman can not be taken.⁶ But a threshing machine can not be exempted as a "tool;"⁷ nor a printing press;⁸ nor printing type and forms.⁹ An article otherwise exempt, is not the less so because it is new and has never been applied to its intended use.¹⁰

9. The right to exempt certain articles is a personal right and may be waived by the defendant; but the mere silence of a party while an officer is stripping him of his property exempt from seizure, under color of legal authority, is no waiver, and furnishes no protection to the wrongdoer.¹¹ The rule, however, as to exempt property, is to be strictly construed as against the owner, and if he sell the exempt property, a debt due him therefor may be attached.¹²

10. The attaching creditor can acquire no greater right

¹ Laws of 1850, chap. 260, p. 499.

² Robinson's case, 2 Abb., 466.

³ Wheeler v. Cropsey, 5 How., 288.

⁴ Van Buren v. Loper, 29 Barb., 388; Eastman v. Caswell, 8 How., 75;

⁵ Bitting v. Vandenburg, 17 How., 80.

⁶ Harthouse v. Ryker, 1 Duer, 606; see also Hoyt v. Van Alstyne, 15 Barb., 568.

⁷ Ford v. Johnson, 34 Barb., 366.

⁸ Buckingham v. Billings, 13 Mass., 82.

⁹ Donforth v. Woodward, 10 Pick., 423.

¹⁰ Fields v. Moul, 15 Abb., 6.

¹¹ Frost v. Mott, 34 N. Y. R., 253.

¹² See Drake on Attach., § 244.

in attached property than the defendant had at the time of the attachment, unless such property has been fraudulently transferred by the defendant. If, therefore, the property be in such a situation that the defendant has lost his power over it, or has not yet acquired such interest in, or power over it, as to permit him to dispose of it adversely to others, it cannot be attached for his debt.¹ Thus, where goods were to be delivered to the defendant in New Orleans, for cash payment, it was held that they could not be attached while passing through New York, *en route*.² So, merchandise sold and shipped to B by A, cannot be attached for B's debt, so long as A retains the right of stoppage *in transitu*.³ So, where property is sold and delivered, on condition that the title shall not vest in the purchaser, unless the purchase price be paid within a specific time, the purchaser has no attachable interest in the property until the condition is performed.⁴ So, where one comes into possession of goods by fraudulent means, he acquires no such title thereto, as will enable his creditors to attach and hold them as against the person from whom they were fraudulently obtained.⁵

11. Where goods of the defendant are in possession of a third party, having a lien thereon, they may be attached by the service, on such third party, of a certified copy of the warrant, with a notice, as prescribed by section 235. But the goods themselves cannot be seized.⁶ In such case, the attachment binds the remaining interest of the defendant, after the satisfaction of the lien.⁷ If the plaintiff desires the sheriff to seize and take possession of such goods, he must first discharge the lien thereon. Where

¹ Drake on Attach., § 245, and cases cited.

² Bates v. N. Orleans R. R., 4 Abb., 72, 13 How., 516.

³ Jones v. Bradner, 10 Barb., 193.

⁴ Buckmaster v. Smith, 22 Verm., 203.

⁵ Drake on Attachments, § 246, citing many cases.

⁶ Brownell v. Carnley, 3 Duer, 9; Frost v. Willard, 9 Barb., 440.

⁷ Patterson v. Perry, 10 Abb., 82.

goods are in the custom house with the duties unpaid, the sheriff cannot require a manual delivery, but may attach them by the service of the notice and a certified copy upon the collector and the consignees of the goods.¹

12. But to enable a third party to hold the defendant's property as against an attaching creditor, he must have a valid and subsisting lien; mere possession will not be sufficient. If he have no lien, legal or equitable, nor any right, as against the owner, by contract, by custom, or otherwise, to hold the property as security for some claim of his own, he cannot hold the property to satisfy his claim, as against the attachment, but must attach it as any other creditor for his debts.²

13. Goods in the possession of a factor, having a lien thereon, cannot be attached for the debt of the factor; for the lien does not dispossess the owner, until the right is exercised by the factor; and the right being a personal one, cannot be set up as against the owner by any one but the factor himself.³ So, property loaned to one cannot be attached for his debts.⁴

14. Property in the custody of the law cannot be attached. Thus, money collected on an execution is held to be in the custody of the law and not liable to be attached.⁵ But this applies only where the sheriff is bound, *virtute officii*, to have the money in hand to pay to the execution plaintiff, and not where there is a surplus of money in his possession after satisfying the execution. In the latter case the surplus may be attached.⁶ Thus, where an execution was issued and levied upon a horse,

¹ Ruhlman v. Orser, 5 Duer, 242.

² Allen v. Hall, 5 Metcalf, 263; Allen v. Megguire, 15 Mass., 490; see Lawrence v. Bank of the Republic, 31 How., 502.

³ Holly v. Huggeford, 8 Pick., 73.

⁴ Chase v. Elkins, 2 Vermont, 290.

⁵ Muscott v. Woolworth, 14 How., 477; Overruling same case, 13 How., 336; Dubois v. Dubois, 6 Cow., 494, see Drake on Attach., § 251.

⁶ Wheeler v. Smith, 11 Barb., 345.

and an attachment was subsequently issued against the same defendant, and also levied upon such horse, and the horse was sold under the execution, it was held that the lien of the attachment was transferred by the sale to the surplus proceeds left after satisfying the execution.¹ It was held, in one instance, that money deposited in lieu of bail might be attached, even where it was deposited by a third party to enable the defendant in the attachment suit to obtain his release.² But this decision was reversed at general term.³

15. A mortgagor of a chattel mortgage, before it becomes due, has an interest in the property mortgaged which is subject to seizure by attachment and sale upon execution under it, whether such interest is subject to a levy on an execution or not.⁴ But after a failure on the part of the mortgagor to comply with the conditions of the mortgage, the mortgagee's title becomes absolute, and the property cannot be attached, even when it remains in the mortgagor's possession.⁵ So, if before sale under a levy on mortgaged property, the mortgagor's interest determines, and the mortgagee's title becomes absolute, the latter may claim an immediate delivery, without tender of expenses.⁶

16. So, an interest contingent upon the happening of some future event, is not, while the contingency lasts, a debt liable to attachment. Thus, where articles were made in this state for a corporation in New Orleans, and they were to be paid for on delivery in that city, it was held that such corporation acquired no title until delivery and payment, and that the goods could not be attached for a debt of such corporation, while in transit.⁷ So,

¹ Wheeler v. Smith, 11 Barb., 345.

² Salter v. Weiner, 6 Abb., 191.

³ See 1 Abbott's Digest, 360, note.

⁴ Hall v. Samson, 23 How., 84;
same case, 19 How., 481; Fairbanks
v. Bloomfield, 5 Duer, 434.

⁵ Champlin v. Johnson, 39 Barb.,
606.

⁶ Fairbanks v. Bloomfield, *supra*.

⁷ Bates v. N. Orleans R. R., 4
Abb., 72.

wages payable at a specified time, but liable to forfeiture before that time, cannot be attached, until the expiration of such time.¹

17. The leviable property of a copartnership may be seized on an attachment against one of the members of such partnership, and the sheriff may take such property into his possession and sell the defendant's interest in so much thereof as is necessary. This is the rule on execution, and an attachment, in so far as it relates to chattels, differs in no wise from an execution, as to the rights and duties of the officer in levying it.² But the sheriff can only sell the interest or share of the defendant in the attachment, although he may deliver the whole goods sold to the purchaser, who takes them as joint tenant with the other partners, and subject to account for the full value in favor of partnership creditors.³

18. But the interest of a special partner in a firm is not subject to the same rule, and cannot be seized or sold, under an attachment against such special partner.⁴

19. The doctrine as stated above is not limited to cases of partnership, but applies to any interest which the defendant may have in common with others. The sheriff may seize the property, even though it be in the possession of the cotenant, but he can only sell the undivided interest of the defendant, and the purchaser becomes a tenant in common with the other cotenants.⁵

20. Upon a levy of partnership property, either on an attachment against the firm, or against one of its mem-

¹ Bal. & Ohio R. R. v. Gallashue, 14 Grattan, 403.

² Goll v. Hinton, 8 Abb., 120, and cases; Smith v. Orser, 43 Barb., 187; Phillips v. Cook, 24 Wend., 389; Hergman v. Dittleback, 11 How., 46.

³ Phillips v. Cook, 24 Wend., 389; Walsh v. Adams, 3 Denio, 125; Burrall v. Ackers, 23 Wend., 606; see,

however, Abels v. Westervelt, 24 How., 284; see remarks on latter case; Smith v. Orser, 43 Barb., 187.

⁴ Harris v. Murray, 28 N. Y. R., 574.

⁵ Mersereau v. Norton, 15 John., 179; Drake on Attach., § 248, and cases cited; see Waddle v. Cook, 2 Hill, 47, note.

bers, the sheriff may seize the partnership books and papers; but his power over them is limited to safe custody. He has no right to examine or copy such books or papers, nor to suffer them to be examined or copied by any one except the defendant, without special order of the court.¹ But the letters and correspondence of the firm are not subject to attachment.²

21. The principle is laid down by Mr. Drake in his admirable work on Attachments, after an examination of the decisions of the courts of several other states, that while the tangible property of a firm may be seized on an attachment against one of the members, the partnership credits and choses in action are not, in such case, the subject of attachment.³

22. To render a debt due from a non-resident debtor to a non-resident creditor liable to attachment at the suit of a third party, such debt must be existent within the state. Where the whole transaction took place elsewhere, it cannot be attached.⁴ Nor will the fact that the mere evidence of such debt, as a bond or note, happens to be within the state, avail to make the debt itself attachable.⁵ Nor are the bonds of a foreign corporation, executed and left in the hands of their agent for the purpose of raising money, attachable. In that condition they are neither debt nor property.⁶

23. Where assigned property has been sold by the assignee and its *identity* gone, the *proceeds* cannot be attached, or levied upon by the sheriff as the assignor's property; and merely setting aside the assignment will not vest the title to such proceeds in the assignor.⁷ Where

¹ Hergman v. Dittleback, 11 How., 46.

² Id.

³ See Drake on Att., § 567, 570.

⁴ Willett v. Equitable Ins. Co., 10 Abb., 193.

⁵ Bates v. N. Orleans R. R., 13 How., 516; 4 Abb., 72.

⁶ Coddington v. Gilbert, 17 N. Y. R., 489; 5 Duer, 72.

⁷ Lawrence v. Bank of the Republic, 31 How., 502.

an action was brought by the general assignees of judgment debtors against a bank, to recover a debt due them for money — proceeds of the assigned property — which they had deposited to their credit as such assignees, and the bank, claiming the assignment to be fraudulent, set up as an offset or counter claim, that it had obtained a judgment against the plaintiff's assignor in an attachment suit; that an execution had been issued thereon and returned unsatisfied, and that the bank had a right to apply the money deposited by the plaintiffs toward the payment of their judgment, the sheriff having previously attached in favor of the bank, the funds standing upon the books of the bank to the credit of the plaintiffs; it was held that the bank was not entitled to retain the money to satisfy the judgment against the plaintiff's assignor.¹

24. The sheriff may seize property in the possession of a person claiming title to it under a bill of sale, assignment or mortgage, from the defendant; and it is now well settled that he may justify such seizure in an action brought by such person, by showing that the pretended transfer was fraudulent, notwithstanding that no judgment has been recovered in the attachment suit.²

25. The real estate of the defendant is subject to attachment in the same manner as the personal estate, and the sheriff is under no obligation to exhaust the personalty first.

26. The words "real property," as used in this chapter, are coextensive with lands, tenements and hereditaments.³ And the equitable interest which a defendant has in lands is subject to attachment.⁴

¹ *Lawrence v. Bank of the Republic*, 31 How., 502.

² *Rinchey v. Stryker*, 26 How., 75;
Kelley v. Lane, 28 How., 128;
Thayer v. Willett, 5 Bosw., 344; 9

Abb., 325; *Greenleaf v. Mumford*, 30 How., 30.

³ *Code*, § 462.

⁴ *Lee v. Hunter*, 1 Paige, 519.

SECTION VI.

HOW WARRANT EXECUTED.

1. § 232. Mode of proceeding in executing warrant.
2. Provision of statute relating to absent debtors.
3. Sheriff should see that warrant is regular in form.
4. Must execute it without delay.
5. Rules governing executions applicable.
6. Sheriff must take actual possession.
7. Seizing exempt property.
8. Must attach sufficient to secure plaintiff's claim.
9. Must take only goods of defendant.
10. How sheriff to proceed in case of doubt.
11. When goods of stranger are intermixed with defendants.
12. What sheriff must show to justify attaching goods thus intermixed.
13. How much property sheriff must attach.
14. Should seize only sufficient to amply secure plaintiff.
15. Cannot execute attachment out of county.
16. Subject to same rules as to breaking dwellings, etc., as on execution or arrest.
17. Cannot break defendant's dwelling.
18. When outer door open may enter, and break inner door, etc.
19. To whom the privilege extends; not to house of a stranger.
20. Nor to one not used as a habitation.
21. What will constitute a dwelling.
22. Temporary absence from, does not suspend the privilege.
23. Where house is let to lodgers.
24. Sheriff may break in to *complete* levy, commenced in the house.
25. How long sheriff may stay on premises of defendant or stranger.
26. What is actual possession by sheriff.
27. Need not proclaim a levy in all cases.
28. Property must be in sight of officer.
29. How levy made on heavy articles.
30. Against the property of one member of a firm.
31. Against special partner.
32. Goods on board vessels, how attached.
33. Real estate, how attached.
34. Sheriff not to do any act to abandon attachment.
35. *Inventory*, when and how made.
36. May make further levy, if sufficient has not been seized.
37. Sheriff to retain property, even though his term of office has expired.
38. Sheriff has right of action for injury to property.
- 39-40. What care of property sheriff is required to take.
41. What will excuse sheriff for failing to produce attached property.
42. Expense of keeping, will not.
43. Perishable property, sale of.
44. How sheriff to collect debts, etc.
45. Sheriff may continue action pending at the time of attachment.
46. What actions sheriff can bring.
47. May employ attorneys and counsellors.
48. § 238. When plaintiff may maintain action.
49. Strict compliance with section necessary.

1. "The sheriff to whom such warrant of attachment is directed and delivered, shall proceed thereon, in all respects, in the manner required of him by law, in case of

attachments against absent debtors; shall make and return an inventory; and shall keep the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in such action; and shall subject to the direction of the court or judge, collect and receive into his possession all debts, credits and effects of the defendant. The sheriff may also take such legal proceedings, either in his own name or in the name of such defendant, as may be necessary for that purpose, and discontinue the same, at such times and on such terms as the court or judge may direct.”¹

2. The sheriff is to proceed to execute the warrant, in all respects, in the manner required of him by law, in case of attachment against absent debtors. The manner in which the sheriff is required to proceed in the case of attachment against absent debtors, is as follows: “The sheriff to whom any such warrant shall be directed and delivered, shall immediately attach all the real estate of such debtor, and all his personal estate, including money and bank notes, except articles exempt from execution; and shall take into his custody all books of account, vouchers and papers relating to the property, debts, credits, and effects of such debtor, together with all evidences of his title to real estate, which he shall safely keep, to be disposed of as hereinafter directed.”² “He shall, immediately on making such seizure, with the assistance of two disinterested freeholders, make a just and true inventory of all the property so seized, and of the books, vouchers and papers taken into his custody, stating therein the estimated value of the several articles of personal property, and enumerating such of them as are perishable; which inventory, after being signed by the sheriff and the appraisers, shall, within ten days after such

¹ Code, § 232.

² 3 R. S., 5th ed.), 80, § 7.

seizure, be returned to the officer who issued the warrant; and the sheriff shall, under the direction of such officer, collect, receive and take into his possession, all debts, credits and effects of such debtor, and commence such suits, and take such legal proceedings in the name of such debtor as may be necessary for that purpose, and which suits and proceedings may be continued by the trustees to be appointed as hereinafter directed, until a final termination thereof."¹

3. Where an attachment is placed in the hands of an officer to be executed, he should see that it be in legal form, and issued out of a court of competent jurisdiction; for if defective in this respect, a levy under it may be inoperative, and the officer levying, liable as a trespasser. But if the warrant be regular on its face, and issued by a judge of a court having jurisdiction, it will be a complete justification to the officer in attaching the defendant's property, and there can, therefore, be no obligation on him to investigate whether the preliminary steps, required for obtaining it, have been pursued.² He should also mark thereon the time when the same was delivered to him for execution.

4. It is the duty of the sheriff to execute the warrant as soon as he reasonably can, after it comes into his hands; for if by his unnecessary delay in seizing the property, the plaintiff loses his debt, the officer will be liable.³ But such warrant cannot be executed on Sunday, or the proceedings founded on it will be vacated.⁴

5. In general, the rules governing executions, and regulating the duties of sheriffs in executing executions, are

¹ 3 R. S. (5th ed.), 80, § 8, as amended Laws 1840, p. 296.

² Drake on Attach., § 185 (2d ed.); *Fulton v. Heaton*, 1 Barb., 552; see *Kelley v. Breusing*, 33 Barb., 123; also *Smith v. Orser*, 43 Barb.,

187; *Stimpson v. Reynolds*, 14 Barb., 506.

³ Drake on Attachments, § 191.

⁴ *Rob v. Moffat*, 3 John., 257; 1 R. S., 678, § 69.

applicable to attachments; with the exception, however, that, there being no return day in an attachment warrant, the lien upon goods, not levied upon, does not, as in case of execution, expire with the return day.¹

6. The sheriff, on receiving the attachment, is to attach, take into his possession and safely keep all the property of the defendant, not exempt from execution, within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with all costs and expenses. To render the seizure effectual, it must be accompanied by possession. The sheriff must not only seize, but he must take the property attached into custody. In case of neglect to perform his duty in this respect, he is subjected to personal responsibility.²

7. But he should be careful not to seize any property not liable to attachment; for if he do, he will be a trespasser. If he seize all the property of a debtor, knowing that part of it is exempt, he cannot justify the seizure by the omission of the debtor to designate a particular portion thereof as not subject to execution or attachment. The mere silence of a party while an officer is stripping him of his property exempt from seizure, under color of legal authority, furnishes no protection to the wrong doer.³

8. Personal property found in the possession of the defendant, may be presumed to be his, if nothing appear to the contrary. If the sheriff omit to attach property so situated, when necessary for the plaintiff's security, he will be liable to the plaintiff, unless he can show that the property was not, in fact, the defendant's; or unless there were reasonable grounds to suspect that the defendant was not the owner, and the plaintiff refused to indemnify the officer against liability to third parties.⁴ If the goods

¹ See *People v. Schuyler*, 5 Barb., 166.

² *Smith v. Orser*, 43 Barb., 187.

³ *Frost v. Mott*, 34 N. Y. R., 253.

⁴ *Drake on Attach.*, § 188, (2d ed.).

are not in the defendant's possession, but in the possession of a third party who claims them as his own, the sheriff may refuse to attach them, unless indemnified by the plaintiff.¹

9. The sheriff is bound, at his peril, to take only the goods of the defendant; and is liable as a trespasser if he take the goods of a third person, although the plaintiff assures him they are the defendant's.² If the plaintiff take part in, or direct such levy, he will be equally a trespasser, and liable to an action of either trespass, trover, or replevin;³ and the fact that there has been no *manu-caption*, or *actual* seizure of such goods, will not relieve either the sheriff or plaintiff from such liability, provided the property was bound by the levy, and was in the officer's power.⁴ But where property of a copartnership is taken on an attachment against some of the members of the firm, an action will not lie against the sheriff at the suit of all the members.⁵

10. The sheriff should take every precaution to avoid levying on any property other than the defendant's. In cases of doubt, the law permits him to summon a jury *de bene esse*, to satisfy himself. This will justify him in returning, if it be so found, that the defendant has no goods within his bailiwick, although it should afterwards appear that the goods were the defendant's; unless it is shown that he did not act in good faith.⁶ But if the plaintiff tender a sufficient bond of indemnity to the sheriff, an inquisition will not justify that officer in returning that the defendant had no goods, if the fact turn out to be otherwise.⁷

¹ Chamberlain v. Beller, 18 N. Y. R., 115.

² Lummis v. Kasson, 43 Barb., 373.

³ Kuhlman v. Orser, 5 Duer, 242; Marsh v. Backus, 16 Barb., 483; Clark v. Skinner, 20 John., 468.

⁴ See Stewart v. Wells, 6 Barb.,

79; Neff v. Thompson, 8 Barb., 213; Knapp v. Smith, 27 N. Y. R., 277.

⁵ Smith v. Orser, 43 Barb., 187.

⁶ Lummis v. Kasson, 43 Barb., 373; Rogers v. Wier, 34 N. Y. R., 463.

⁷ Bayley v. Bates, 8 John., 185; Vancleef v. Fleet, 15 John., 147; see Lummis v. Kasson, *supra*.

11. Where the goods of a stranger are intermixed with those of the defendant, and the sheriff attaches the whole, the owner can maintain no action against the officer for taking them, until he notifies the officer of his title, and demands and identifies his goods. If, after such notice, the officer sell the whole, he will be liable.¹ But if the stranger shall have willfully confused his goods with those of the defendant, so that they cannot be distinguished, the whole becomes the property of the innocent party, and the sheriff may attach it.²

12. But to justify an attachment of the goods of a stranger, on the ground of confusion or intermixture, the burden is on the sheriff, to show that the goods were of such a character, or so commingled, as not to enable him, after due inquiry to distinguish between them and those of the defendant.³ However, if the owner know of the attachment, it is his duty to notify the sheriff of his claim;⁴ and if the sheriff request him to point out his property, and he refuse, though able to do so, he cannot proceed against the officer for tort in taking the whole.⁵

13. It is incumbent on the sheriff to attach sufficient property to satisfy the plaintiff's demand, as stated in the warrant, together with all costs and expenses, provided sufficient property can be found; and if he neglect or fail to do this, he will be liable for the deficiency. Thus, where a sheriff received three attachments and levied them successively upon the personal property of the defendant, and afterwards received a fourth, which he levied upon his real estate, the proceeds of which were absorbed in satisfying that warrant, and upon sale, it appeared

¹ Drake on Attach., § 199, and cases cited; Silsbury v. McCoon, 3 N. Y. R., 379.

² Hart v. Ten Eyck, 2 John. Ch., 62, 108; Frost v. Willard, 9 Barb.,

440; Silsbury v. McCoon, 3 N. Y. R., 379.

³ Walcott v. Keith, 2 Foster, 196; Wilson v. Lane, 33 N. Hamp., 466.

⁴ Id.

⁵ Sawyer v. Merrill, 6 Pick., 478.

that the personalty, on which the first three warrants were levied, was not sufficient to satisfy them, it was held that the levy under the fourth gave it preference over the others; and that the sheriff was liable for the deficiency, notwithstanding the fact that the personalty was appraised at more than enough to satisfy the warrants levied upon it.¹ But the plaintiff cannot insist upon the sheriff's attaching more than is reasonably likely to satisfy his demand, with costs and expenses. Thus, where the sheriff had attached property appraised at \$466 to satisfy a claim of \$200, it was held that the plaintiff could not require him to attach more; though if upon sale, the property prove insufficient, the sheriff would be liable for the discrepancy.²

14. There is no restriction upon the sheriff as to the amount of property he shall attach, and he may take the whole of the defendant's property; but he should not do so where it is obviously unnecessary, but should only seize so much thereof as would afford ample security for the plaintiff's demand, with costs and expenses. However, a seizure of more property than is necessary will not invalidate the attachment; although if the sheriff act oppressively and with malicious intent, he may be liable to the injured party for the damage sustained.³

15. A sheriff cannot execute a warrant of attachment out of his own county; and if he do so under a mistake as to the boundaries, the property attached will be ordered released. But if the property be taken out of the county or state after it has been once attached by the sheriff, he may follow and retake it.⁴

16. The sheriff has the same power and authority in attaching property, as in making a levy under an execu-

¹ Ransom v. Halcott, 18 Barb., 56; 9 How., 122.

² McKay v. Harrower, 27 Barb., 473.

³ Abbott v. Kimball, 19 Vermont, 551; Merritt v. Curtis, 18 Maine, 272.

⁴ Utley v. Smith, 7 Vermont, 154.

tion,¹ and is subject to the same rules in reference to breaking into dwellings, as he is in cases of arrest in a civil action, or in case of making a levy under an execution.²

17. He may enter the defendant's dwelling, peacefully, if he can, but has no right to do so in the absence of the owner and family, and against his known wishes; and a mere raising the latch, or lifting a window to obtain entrance to serve a civil process, is a breaking the house which cannot be justified;³ and not only is the forcing an unlawful act, but the attachment made by means thereof is unlawful and invalid.⁴ Nor will the officer be justified in gaining an entrance by fraud. Nor if the door is opened by any person in answer to a knock or a ring, will he be justified in rushing in. But, if, on knocking or ringing at the outer door, any proper person appears and invites him into the house, he may lawfully enter and execute his warrant.⁵

18. So, if any of the outer doors be open, the officer may lawfully enter the house and execute his process.⁶ And when he is once within the walls, having entered lawfully, at the outer door, he may break open every inner door, closet, box, drawer or trunk, and, when necessary, he should do so.⁷ But before any such violence is used, he should demand that they be opened.

19. The law regards every man's house as his castle and fortress, as well for his defense against injury and violence, as for his repose; and, therefore, it is that the outer door or window shall not be broken open by process.⁸ The privilege is not the privilege of a debtor,

¹ *Learned v. Vandenburg*, 7 How., 379.

² *Glover v. Whettenhall*, 6 Hill., 598, note.

³ *People v. Hubbard*, 24 Wend., 369; *Curtis v. Hubbard*, 4 Hill., 437.

⁴ *People v. Hubbard*, *supra*; *Ilsey v. Nichols*, 12 Pick., 270.

⁵ *Impey*, 74; *Crocker on Sheriffs*, § 312.

⁶ *Hubbard v. Mace*, 17 John., 127; *Haggerty v. Wilbur*, 16 John., 287.

⁷ *Haggerty v. Wilbur*, 16 John., 287; *Cowper*, 7.

⁸ 3 Ins., 64; 3 Coke, 92; 3 Cowper, 6.

properly speaking, but is annexed to the house and outer door, for the protection of a man and his family, including boarders, servants and domestics;¹ and, even guests within the house, unless they shall have gone there to avoid process held by the sheriff.² But the privilege does not extend to strangers; so that if the goods of the defendant are in the house of another, who refuses to deliver them after demand, the sheriff may break the outer door and enter into the house.³ But, in such case, the officer's justification depends entirely upon the fact of the goods of the defendant being found in the house. No matter how recently they may have been there before the entry, nor how reasonable the cause to suspect that they were in the house, if the fact turns out to be, that the goods were not in the house at the time of the entrance and search, the officer will be a trespasser.⁴

20. The privilege is also limited to a man's house used for a habitation, and to the outhouses which are parcels thereof, and immediately connected therewith. The officer, may, therefore, break open any store, warehouse or barn, or any building not actually occupied as a dwelling, nor annexed to a dwelling house, nor forming any part of the curtilage.⁵ But a demand should be first made.

21. To exempt a building from liability to forceful entry, it must be actually used at the time as a dwelling house. The fact that a man's household goods are in a house, will not make it a dwelling, unless some one abide there; nor will a house be a dwelling, though the owner has put all his furniture into it, and has generally gone to it in the day time, if neither he, nor any of his family have

¹ 1 Cowper, 6.

² *Curtis v. Hubbard*, 1 Hill, 336.

³ *Burton v. Wilkinson*, 18 Vermont, 186; Allen, 109; 3 Black. Com., 288; 6 Taunt., 246; 5 Coke, 93.

⁴ 2 Dowl. & Lown., 199; 13 Mees. & Wel., 52; 6 Taunt., 246; 6 Modern, 105; Allen, 109.

⁵ *Haggerty v. Wilbur*, 16 John., 287; *Hubbard v. Mace*, 17 John., 127.

yet slept there. And though persons sleep in a house thus situated, yet, if they are not of the family of the occupant, it will not be a dwelling, as where persons are procured to sleep in such house, to protect the house or goods, they not being members of the family, nor domestics therein. And the mere casual use of a tenement, as a lodging, will not be such an inhabiting as will constitute such place a dwelling house, as where a servant sleeps in a barn for some nights, to watch thieves, or where a porter lies in a warehouse to watch goods.¹

22. But where the owner has once entered upon the occupation and possession of a dwelling house, by himself or some one of his family, it will not cease to be his dwelling house, on account of any temporary or occasional absence, even though no person be left in it. But when the owner is so absent, there must be an intention on his part, of returning to his home; for if he has quitted it without any intention of returning, and continuing to dwell there, it ceases to be a dwelling.²

23. If the whole house is let to lodgers, and the owner does not inhabit any part of it, though there is but one door common to all the inmates, yet every separate apartment is the distinct mansion of its respective possessor.³ But if a man let out part of his house, reserving for himself an inner room, he is considered in law, the occupant of the whole, and an officer, entering through the outer door, which is open, may break the inner door of the owner's room; but a previous demand is essential.⁴

24. If the sheriff has seized the defendant's goods, after gaining lawful entrance to the dwelling, and is called away before completing the levy, and he returns the next day to finish the inventory, on making known his business

¹ Russell on Crimes, §§ 803, 805.

² Russell on Crimes, § 805.

³ Sewell, 110.

⁴ Williams v. Spencer, 5 John.,

352; Radcliff v. Burton, 3 Bos. & Pul., 223; see Hubbard v. Mace, 17 John., 127.

and demanding admittance, he may, if it be refused, break the outer door.¹

25. When the sheriff seizes goods upon the premises of either the defendant, or of a third person, he cannot, without their consent, stay upon such premises longer than is reasonably necessary to make his inventory, and to remove the goods.² But if the goods are seized upon defendant's premises, and left with the defendant, the officer may sell them there, and third persons may attend as bidders.³

26. As has been before remarked, the sheriff, in executing the warrant, must proceed in the same manner as in making a levy under an execution. In attaching personalty, he must reduce it into actual possession, so far, as under the circumstances, can be done. In case of neglect to do this, he subjects himself to personal responsibility.⁴ What is an actual possession, sufficient to constitute an effectual attachment, must depend upon the nature and position of the property. In general, it may be said, that it should be such a custody as will enable the officer to retain and assert his power and control over the property, so that it cannot probably be withdrawn, or taken by another without his knowing it.⁵ The property should be present and subject to the control of the officer and he should take such a possession, and exercise such a dominion over it, as will render him a trespasser, if the process under which he acts is not a protection to him.⁶ But it will not be essential, either to make a valid levy or to constitute the officer a trespasser, that he should touch or handle the property. It will be sufficient, if the pro-

¹ *Glover v. Whittenhall*, 6 Hill., 597.

² *Watson*, 174.

³ *People v. Hopson*, 1 Denio, 574.

⁴ *Smith v. Orser*, 43 Barb., 187; *Westervelt v. Pinckney*, 14 Wend., 125.

Learned v. Vandenburg, 7 How., 379; 8 How., 77.

⁵ *Drake on Attach.* (2d ed.), § 256.

⁶ *Price v. Shipps*, 16 Barb., 585;

Ray v. Harcourt, 19 Wend., 495;

perty is present, and he claims to exercise control over it, by virtue of his warrant, or that he make an inventory of it.¹

27. Although in making the levy, the acts of the sheriff should be open and unequivocal, and he should assert his title to the goods, and nothing should be done to cast concealment over the transaction, yet it is not essential that he should proclaim a levy in all instances, or give any notoriety to the act. For it may sometimes be necessary that he should keep the knowledge of the levy from the defendant, and other persons, until he can have time to take complete possession of the property; or that he may have time to attach other property of the defendant, before he has time to secrete or dispose of it, or before another creditor can levy on it under other process.²

28. The sheriff must not only take actual possession of the property attached, but such property must be in the sight and presence of the officer when he levies upon it. Making actual levy on a part, and, including in the inventory, other property not in view, is not such a levy upon the latter as will secure a priority as against other process or *bona fide* purchasers.³ Thus, where an officer sat upon his horse in the road, and did not see the property, nor know where it was, but made a memorandum of it, as the defendant named it over, it was held not to be a sufficient levy as against persons subsequently purchasing the property from the judgment debtor, although sufficient as against such judgment debtor himself.⁴ So, where the officer levied upon five head of cattle and made a memorandum thereof, but only saw three of them, the levy was incompetent as to one who afterward purchased in good faith, the two unseen by the officer.⁵

¹ Connah v. Hale, 23 Wend., 462; Westervelt v. Pickney, 14 id., 125; Stewart v. Wells, 6 Barb., 79.

² Crocker on Sheriffs, § 428; Butler v. Maynard, 11 Wend., 548.

³ Ray v. Harcourt, 19 Wend., 495.

⁴ Dunning v. Stearns, 9 Barb., 630.

⁵ Van Wyck v. Pine, 2 Hill., 666.

29. But where the articles are heavy and unmanageable; there seems to be no necessity for an actual handling, to constitute an efficient attachment. Thus, where the sheriff attached hay in a barn, by going within view of it and declaring in the presence of witnesses that he attached such hay, and by putting upon the barn door a notice to that effect, it was held sufficient.¹

30. Upon an attachment against the property of one member of a copartnership, the sheriff may seize the leviable property of the copartnership, take it into his possession and sell the defendant's interest in so much thereof as is necessary. This is the rule on executions, and an attachment, in so far as it relates to chattels, differs in no wise from an execution, as to the rights and duties of the officer in levying it.² The sheriff can only sell the interest or share of the defendant in the attachment, yet, he may deliver the whole goods sold, to the purchaser, who takes them as joint tenant with the other partners, and subject to account for the full value in favor of partnership creditors.³

31. But this rule does not apply on an attachment against the special partner of a firm. In such case the officer cannot levy and sell the right, title and interest of such special partner in the goods, chattels and assets of the firm; and if the sheriff sell such interest, the purchaser is bound to know that such sale is illegal.⁴

32. Where goods of any non-resident, concealed, or absconding debtor shall have been shipped, in good faith, on board of any ship or vessel, for the purpose of transportation, without reshipment or transshipment in this

¹ *Merrill v. Sawyer*, 8 Pick., 397; *Walsh v. Adams*, 3 Denio, 125; see *Drake on Attach.*, § 258.

² *Goll v. Hinton*, 8 Abb., 120, and cases; *Smith v. Orser*, 43 Barb., 187; see *Hergman v. Dettleback*, 11 How., 46.

⁴ *Harris v. Murray*, 28 N. Y. R., 574.

³ *Phillips v. Cook*, 24 Wend., 389;

state, to any port or place out of this state, the sheriff cannot seize them or attach them in any manner, unless the attaching creditor, his agent or attorney, shall execute a bond, with sufficient sureties, to any or either of the owners or masters of the vessel on board of which such goods shall be shipped, conditioned to pay such owner or master all expenses, damages and charges which may be incurred by such owner or master, or to which they may be subjected for unlading said goods from said vessel, and for all necessary detention of said vessel for that purpose. But the owners or masters of such vessel must act in good faith, for if they have actual knowledge of the attachment before or at the time of the shipment of the goods, or if they have in any wise connived at, or been privy to, the shipment of such goods, for the purpose of screening them from legal process, or for the purpose of hindering, delaying, or defrauding creditors, they are not entitled to security, but the sheriff may seize the property.¹

33. In attaching real estate, it is not necessary for the sheriff to go upon the land, nor into its vicinity, nor to see it, nor to do any other act, further than to include it in the inventory returned.² But, to render such attachment binding as against subsequent purchasers and incumbrancers, the plaintiff must immediately file a notice of *lis pendens*, as is provided by section 132 of the Code. Such notice is operative only as to such lands as the sheriff has attached, though other lands may be included therein.³

34. After an attachment has been served, the sheriff should be careful to do no act which may be construed into an abandonment of the attachment, or the attachment may be a nullity.⁴

¹ 3 R. S., 80, §§ 13, 14, (5th ed.).

² *Learned v. Vandenburgh*, 7 How., 379; 8 How., 77.

³ *Fitzgerald v. Blake*, 28 How., 110.

⁴ *French v. Stanley*, 21 Maine, 512.

35. The sheriff, having duly levied the attachment, and taken into his possession the attached property, his next duty is, to make, immediately, with the assistance of two disinterested freeholders, a just and true inventory of all the property so seized, and of the books, vouchers, and papers taken into his custody, stating therein the estimated value of the several articles of personal property, and enumerating such of them as are perishable; which inventory, after being signed by the sheriff and the appraisers, must, within ten days after such seizure, be returned to the officer who issued the warrant.¹ Although the property attached be appraised at more than enough to satisfy the plaintiff's demand, with costs and expenses, yet, if it afterwards prove insufficient, the sheriff will be liable for the deficiency, provided there was other property of the defendant which he might have attached.² The value of the articles should be estimated at what they are reasonably worth at the time the appraisal is made. It is not necessary that the inventory should be made on the same day that the property is attached.³ (See form No. 98)..

36. Should it appear at the time of making the inventory, or afterwards before execution, that sufficient property has not been seized, the sheriff may make a further levy on other property, as in case of execution.⁴

37. It is the duty of the sheriff to retain in his possession the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in the action, and if the plaintiff recover judgment, until the property is sold under an execution issued thereon, unless the judgment be otherwise satisfied,

¹ 3 R. S. (5th ed.), 80; Code, § 232.

² Ransom v. Halcott, 9 How., 119; 18 Barb., 56; see McKay v. Harrower, 27 Barb., 463.

³ Greenleaf v. Mumford, 30 How., 30.

⁴ Denvrey v. Fox, 22 Barb., 522; Peck v. Tiffany, 2 Comst., 451.

or the property be sold as perishable.¹ The custody of the property, *pendente lite*, remains with the sheriff to whom the attachment was originally issued, and does not pass to his successor, on the expiration of his term of office.² Should he deem it proper, he may have the property insured, but he is under no obligation to do so.³

38. By the levy of the attachment and the reduction of the property into his possession, the sheriff is vested with a special property in the latter, which enables him to protect the rights he has acquired.⁴ For any injury to the property, the sheriff has a right of action, as, in any event, he is accountable for the property either to the creditor or debtor. His right over the property is independent of the plaintiff or defendant, as he is responsible for it to either the one or the other, as the judgment may determine; and his right exists so long as the special property continues in him, that is, so long as he remains liable for the property, either to have it forthcoming to satisfy the plaintiff's demand, or to return it to the owner, upon the attachment being dissolved.⁵

39. It is not, so far as I know, definitely settled, by the courts of this state, as to what degree of care and diligence the sheriff will be held, in keeping the goods attached on *mesne* process. But the general rule, as settled by the courts of some of the other states, appears to be, to hold him responsible for such care and diligence as careful men would expect under the circumstances, or as would be required of bailees for hire. The conduct of prudent and careful men in the region where the attachment is made, may be some guide to what ought to be required of the sheriff in keeping the property attached. He is bound to that degree of diligence which the manner

¹ *McRay v. Harrower*, 27 Barb., 463.

² *Id.*

³ *White v. Madison*, 26 N.Y. R., 117.

⁴ *Barker v. Miller*, 6 John., 195; *Hotchkiss v. M'Vickar*, 12 id., 403.

⁵ *Braley v. French*, 28 Vermont,

546.

and nature of his employment make it reasonable to expect of him ; and any thing less than this is culpable in him, and renders him liable.¹

40. The rule as to the liability of a sheriff for goods seized on final process is, however, well settled, and from the analogy between proceedings on execution and on attachment, it would seem that the rule in both cases would be nearly the same. A sheriff is not an insurer of goods seized upon execution, and therefore, where there is no negligence on his part, is not liable for losses by theft, robbery, fire or other accident.² But, if such goods are lost or injured, either through his own neglect, or through that of others intrusted by him with their custody ; or if he keep them in an unsafe place, or exposes them to destruction, he will be liable for any damage sustained.³ Where the property is injured or lost; the sheriff must show clearly and satisfactorily, that it was not occasioned by neglect on his part, nor by the want of such care as a prudent man would take of his own property.⁴ But where the sheriff leaves the property in the defendant's possession, whether he takes the receipt of a third person or not, he will be liable for a loss of the property, unless it is injured or lost by the act of God or the public enemy ;⁵ or unless the plaintiff directed him to leave such property in defendant's possession.⁶

41. If the sheriff attach property and return the attachment, he is, *prima facie*, liable to produce the property on execution ; but he may excuse his failure to do so by showing that it was not in his power, and that he had been guilty of no fault.⁷ He may excuse himself by

¹ Bridges v. Perry, 14 Vermont, 262 ; Briggs v. Taylor, 28 Vermont, 180 ; see Moor v. Westervelt, 21 N. Y. R., 103 ; 2 Duer, 59 ; 1 Bosw., 358 ; Jenner v. Joliffe, 6 John., 9 ; and 9 John., 381.

² Browning v. Hunford, 5 Hill, 588.

³ Jenner v Joliffe, 9 John., 385.

⁴ Browning v Hunford, 5 Den., 586.

⁵ Id.

⁶ 19 Pick., 520.

⁷ Bridges v. Perry, 14 Vermont, 262.

showing that the property attached was not, in fact, the property of the defendant, but of a third party ; or that the property attached was exempt from execution and so not liable to attachment, or that it was in the custody of the law, and so not attachable.¹ So, even after he has been indemnified by the plaintiff, and has advertised the attached property for sale, he is at liberty to return the execution *nulla bona*, on the property being taken out of his possession, provided he act in good faith ; but in so doing he assumes the responsibility of proving property out of the defendant in the execution.²

42. But the expense attending the keeping of attached property, will not justify a failure to produce it on execution. Therefore, where cattle are attached, the sheriff cannot show, in defense of an action against him for failing to produce them on execution, that the expense of keeping them would have exceeded their value.³ Nor will the expiration of his term of office excuse a failure to produce the property, since his special property in the goods remains during the pendency of the action and does not pass to his successor.⁴

43. The articles that are perishable, are to be enumerated in the inventory, and the sheriff must sell the same, unless it be vessels, under the direction of the judge, at public auction, and retain in his hands the proceeds of such sale, after deducting his expenses, to be allowed by such judge ; which proceeds are to be disposed of in the same manner as the property itself would have been, if unsold.⁵ The motion for an order to sell perishable property should be made to the judge who granted the attachment ; but if his term of office has expired, the motion should be made to the court.⁶ The order must

¹ Drake on Attachments, § 294.

² Lummis v. Kassen, 43 Barb., 373.

³ Drake on Attachments, § 302, and cases.

⁴ M'Kay v. Harrower, 27 Barb., 463.

⁵ 3 R. S. (5th ed.), 80.

⁶ Davis v. Ainsworth, 14 How., 346.

prescribe the time, place and notice of such sale, and the manner in which such notice shall be published.¹

44. The sheriff shall, subject to the direction of the court or judge, collect and receive into his possession, all debts, credits and effects of the defendant. He may also take such legal proceeding, either in his own name, or in the name of the defendant, as may be necessary for that purpose, and discontinue the same, at such times, and on such terms as the court or judge may direct.² To enable the sheriff to collect such debts, credits and effects, and to maintain such legal proceedings, he should first have attached the debts, etc., in the manner prescribed by section 235; that is, he should have left a certified copy of the attachment with the person owing such debt or holding such property, and also a notice showing the property levied on. The certified copy and notice should be served *personally* on the debtor, merely leaving them at the debtor's place of business, with a third party found there, will not be sufficient.³

45. Where the sheriff would himself be entitled to bring an action for the collection of property seized, as a promissory note, he may continue an action for that purpose, which has been already commenced by the debtor, either in the name of the latter, or be substituted as plaintiff.⁴

46. But the sheriff can only bring such actions as the defendant himself could bring, except as against those who subsequently intermeddle with the property already attached. He cannot bring a suit to subject property to an attachment, which could not otherwise be attached. He has no standing in court to institute a creditor's suit, to reach the proceeds of assigned property for the benefit of creditors, which he could not otherwise attach as the debtor's property.⁵

¹ 3 R. S. (5th ed.), 83, § 29.

² Code, § 232, cited ante, pl. 1.

³ Orser v. Grossman, 11 How., 522;
⁴ E.D. Smith, 443.

⁴ Russell v. Ruckman, 3 E. D. Smith, 419.

⁵ Lawrence v. Bank of the Republic, 31 How., 502.

47. Where the sheriff brings an action for the collection of the attached debts, or to set aside fraudulent transfers of property, or for any other purpose necessary in the execution of the attachment, he may employ attorneys and counsel for the prosecution of such action, and is entitled to his necessary disbursements therefor, to be allowed in the same manner as such disbursements were allowed to trustees under attachments, authorized by the revised statutes; and the rule is the same, even where he fails in the action, provided he has acted in good faith.¹ But if the sheriff employ agents to aid him in collecting debts, which he could himself have collected, without resort to an action, or to the employment of attorneys and counsel, he must himself compensate such agents, unless an agreement is made by him with all parties interested in the proceeds.

48. "The actions herein authorized to be brought by the sheriff, may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs, and expenses, on account thereof, not exceeding two hundred and fifty dollars in any one action. Such sureties shall, in all cases, when required by the sheriff, justify by making an affidavit that each is a householder, and worth double the amount of the penalty of the bond, over and above all demands and liabilities."² (See form No. 105). "

49. The plaintiff must comply strictly with the foregoing section, before he is entitled to maintain an action in his own name; and the fact of such compliance should be mentioned in the complaint.³

¹ Mayhew v. Duncan, 31 Barb., 87.

² Code, § 238.

³ Skinner v. Stuart, 15 Abb., 391; 39 Barb., 206; 24 How., 489.

SECTION VII.

HOW SERVED ON PROPERTY INCAPABLE OF MANUAL DELIVERY.

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| <ol style="list-style-type: none">1. § 235. How executed on property incapable of manual delivery.2. Proceeding similar to garnishment.3. Effect of service of copy and notice.4. Service must be personal.5. How property to be specified in notice.6. Notice must be served.7. Where third person has lien on the property.8. Third person must have actual possession. | <ol style="list-style-type: none">9. Privity of contract and interest necessary to charge third person.10. Claim must be positive, not contingent.11. § 236. <i>Certificate to be furnished.</i>12. Sheriff must disclose attachment before he can require.13. When certificate conclusive.14. How examination conducted.15. Cannot require certificate after judgment. |
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1. "The execution of the attachment upon any such rights, shares, or any debts, or other property, incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or with the debtor or individual holding such property, with a notice showing the property levied on."¹

2. The proceeding under the above section is similar, both in nature and design, to the proceeding called *garnishment*, as used in most of the other states, by which a third person, called a garnishee, is garnished, or warned not to pay the money or deliver the property of the defendant, in his hands, to such defendant.² From the analogy between the proceedings, it is obvious that many of the rules and principles governing garnishment are equally applicable to proceedings under this section.

¹ Code, § 235.

² Drake on Attachments, § 451.

3. The service of the certified copy of the warrant, and the notice upon the third party, is an effectual attachment of the property of the defendant in the hands of such third party, differing in no essential respect from attachment by levy, except, as is said, that the plaintiff does not acquire a clear and full lien upon the specific property in the garnishee's or third party's possession, but only such a lien as gives him the right to hold the garnishee personally liable for it or its value. The defendant's rights in the property are so far extinguished as to prevent his making any disposition of it which would interfere with its subjection to the payment of the plaintiff's demand, when that shall have been legally perfected; but for every purpose of making any demand which may be necessary to fix the garnishee's liability to him, or of securing it by legal proceedings or otherwise, his rights remain unimpaired by the pending garnishment; but, of course, can be exercised only in subordination to the lien thereby created. From the time of the garnishment, the effects in the garnishee's possession are considered *in custodia legis*, and the garnishee is bound to keep them in safety, and, it is said, is not at liberty to change them, to convert them into money, or to exercise any act of ownership over them.¹

4. The copy of the warrant, and the notice, should be served upon the person holding the property personally, in the same manner as a summons; therefore, merely leaving the copy and notice with a man in the third party's, or debtor's store, without proof that it ever came to the possession or knowledge of such third party, is wholly insufficient.²

5. The superior court of New York and, also the court of common pleas, have frequently held that the notice to

¹ Drake on Attachments, § 453.

² Orser v. Grossman, 4 E. D. Smith, 443; 11 How., 520.

be served upon the debtor or garnishee, must specify the particular property sought to be attached; and that a mere general notice such as, "all the property of A which is, or may come into your hands," without any further description, is insufficient and void.¹ But these decisions have been recently disapproved of, by the supreme court, and the rule laid down that a general notice, as "all the property of the defendant in the attachment, and his effects, rights, and shares of stock with the interest thereon and dividends therefrom, and the debts and credits of the said defendant now in possession of the said person or under his control, will be liable to attachment, and the said person is required to deliver all such property into the custody of the sheriff without delay," is sufficient.² (See form No. 100).

6. It is not a sufficient compliance with the section, to serve a copy of the warrant, without the notice prescribed and without making an inventory, and the property sought to be reached will not be thereby attached.³

7. The attaching creditor does not acquire any greater right against the third person, or garnishee, than the defendant himself possesses; unless such third person is in possession of the defendant's effects under a fraudulent transfer from the latter.⁴ So, that where such third person has a lien upon the defendant's property in his possession, the attachment is subordinate to the lien, and binds only the remaining interest of the defendant, after the satisfaction of the lien.⁵ In such case the sheriff cannot take actual possession of the property, but can only attach it by serving the notice and copy of the warrant, as provided in the above

¹ Wilson v. Duncan, 11 Abb., 3; Kuhlman v. Orser, 5 Duer, 242; Orser v. Grossman, 4 E. D. Smith, 443; 11 How., 522.

² Greenleaf v. Mumford, 30 How., 30.

³ Lyman v. Cartwright, 3 E. D. Smith, 117.

⁴ Drake on Attach., § 458.

⁵ Patterson v. Perry, 10 Abb., 82; Brownell v. Carnley, 3 Duer, 9; Frost v. Willard, 9 Barb., 440.

section.¹ Goods in the custom house, with the duties unpaid, or goods in the hands of a consignee for sale on commission, can only be attached in this manner; unless the plaintiff first discharge the *liën* thereon.² A promissory note, in the course of litigation, may be attached by serving the required notice and copy upon the attorney.³

8. In order to render the third party or garnishee liable, he must have actual possession, or control of the defendant's property at the time the notice and copy are served; mere constructive possession is not sufficient. Thus where goods were consigned to a consignee, and after the latter had received the bill of lading, but before the arrival of the goods, they were attached, by the service on the consignee of the proper notice or warning, it was held that the consignee was not liable, not having the goods in his possession at the time.⁴ So, where the notice and copy of warrant were served on a consignee, after the arrival of the bills of lading, but before the arrival of the goods; and another notice and copy of attachment against the same defendant, but in favor of other plaintiffs, were served upon such consignee, *after* the arrival of the goods; the latter was held to have preference over the first.⁵

9. It is a well settled rule in the proceeding of garnishment, and to a great extent applicable to the proceedings under this section, that there must, in general, be a privity both of contract, either expressed or implied, and of interest, between the defendant and the garnishee, or third person, in order to render defendant's goods in the hands of such third person liable to be garnished.⁶ Therefore, where the sheriff seized goods of the defendant, and

¹ Frost v. Willard, 9 Barb., 440.

² Kuhlman v. Orser, 5 Duer, 242; Andrews v. Ludlow, 5 Pick., 28.

Brownell v. Carnley, 3 Duer, 9.

⁵ Patterson v. Perry, 10 Abb., 82.

³ Russell v. Ruckman, 3 E. D. Smith, 419.

⁶ See Drake on Attach., § 485.

employed an auctioneer to sell them, the proceeds of such sale, while in the hands of the auctioneer, cannot be attached by service of notice on him; for there is no privity between him and the defendant, he being employed by, and bound to account to the sheriff.¹ So, where the effects in the hands of the third party belong to the defendant as a mere trustee or agent for others, they cannot be garnished, there being no privity of interest. And it is in entire accordance with every principle of justice and equity, that though the legal title to property in the garnishee's possession be in the defendant, yet, if such property really belong to others, it should not be taken to pay his debts.²

10. Where the third party is sought to be charged as debtor of the defendant, the nature of the debt must be such as would give the defendant a right of action, either present or future against him. As has been before remarked, the attaching creditor can acquire no rights or powers that the defendant did not have at the time of the attachment, save in relation to property fraudulently transferred. So, that if the debt is not absolutely payable, either in the present or future, but dependent on a contingency, it is not such a debt as can be properly attached.³

11. "Whenever the sheriff shall, with a warrant of attachment, or execution against the defendant, apply to such officer, debtor, or individual, for the purpose of attaching or levying upon such property, such officer, debtor, or individual shall furnish him with a certificate, under his hand, designating the number of rights or shares of the defendant in the stock of such association or corporation, with any dividend, or any incumbrance

¹ Penniman v. Ruggles, 6 New v. New Orleans R. R., 13 How., Hamp., 166. 516; Lyman v. Cartwright, 3 E. D.

² Drake on Attach., § 489.

Smith, 117.

³ Drake on Attach., § 551; Bates

thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of, or debt owing to, the defendant. If such officer, debtor, or individual refuse to do so, he may be required by the court or judge to attend before him, and be examined on oath concerning the same, and obedience to such order may be enforced by attachment."¹

12. Before the sheriff is entitled to require a certificate designating the nature and extent of the defendant's property, he must disclose, to the person alleged to have such property in his possession, the fact that he has an attachment or execution against the defendant.²

13. It seems that the certificate, when made, is conclusive, if it show any assets, in the hands of the third party; and that an order for the further examination of the party who made it, cannot be granted. Thus, where the alleged debtor of the defendant, certified to having in his hands the sum of \$75, belonging to the defendant, an order for his examination subsequently obtained, was held to be invalid.³ But, where the certificate is to the effect, that the alleged debtor holds no property of the defendant, it is held that the plaintiff may impeach the truth of such certificate, and if he can satisfy the judge of its falsity, the third party may be regarded as having refused the certificate, and an examination may be ordered.⁴ It is difficult to see why the plaintiff may not be allowed to impeach the certificate as well in the one case, as the other; why he may not show that the alleged debtor, has in his possession more of the defendant's property than he certifies to have, as well as to show that such debtor has *some* property, when he alleges that he has *none*.

¹ Code, § 236.

N. S., 210; Hopkins v. Snow, 4

² Schieb v. Baldwin, 13 Abb., 469; Abb., 368.

22 How., 278.

⁴ Carroll v. Finley, 26 Barb., 61;

³ Hoagland v. Stodolla, 1 Code R., Hopkins v. Snow, 4 Abb., 368.

14. Where an examination is had, it must be conducted in the same manner, and subject to the same rules, as an examination of third persons upon supplementary proceedings. Its office is only to ascertain what the third person admits belongs to the judgment debtor; So, that a claim by him, of an exclusive interest in the property will arrest the examination, and the plaintiff's only remedy will then lie in an action against such third person.¹ (For forms of order of examination, see appendix No. 102).

15. On the recovery of judgment in the attachment suit, the powers of the sheriff under the attachment are merged in those acquired under the execution, when lodged in his hands. He can no longer require a certificate under the former process, though he may under the latter.² (For forms herein, see appendix Nos. 100 to 103).

¹ Hopkins v. Snow, 4 Abb., 368; per Mitchell, J.

² Schieb v. Baldwin, 13 Abb., 469; 22 How., 278.

SECTION VIII.

PERISHABLE PROPERTY. WHERE PROPERTY IS CLAIMED
BY THIRD PERSON. VESSELS.

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| 1. § 233. Proceeding in case of perishable property or vessels.
2. Provision of the statute as to perishable property.
3. Order of sale, and by whom made.
4. Where property is claimed by third person.
5. Sheriff to summon jury; inquest how conducted. | 6. Effect of the inquisition.
7. When sheriff may require bond without summoning jury.
8-10. Proceedings on attachment of domestic vessels.
11-17. On attachment of foreign vessels.
18-19. Vessel, how disposed of if not claimed.
20. Notice to be given of sale of perishable property, etc. |
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1. "If any property so seized shall be perishable, or if any part of it be claimed by any other person than such defendant, or if any part of it consist of a vessel or of any share or interest therein, the same proceedings shall be had in all respects, as are provided by law, upon attachments against absent debtors."¹

2. The provision of the statute as to perishable property, is as follows: "If any of the property so seized, other than vessels, be perishable, the sheriff shall sell the same at public auction, under an order of the officer who issued the warrant; and shall retain in his hands the proceeds of such sale, after deducting his expenses to be allowed by such officer, which proceeds shall be disposed of in the same manner as the property so sold would have been if it had remained unsold."²

3. The motion for an order to sell perishable property should be made to the judge who granted the attachment; but if his term of office has expired, the motion may be

¹ Code, § 233.

² 3 R. S., (5th ed.), 80.

made to the court.¹ The order must prescribe the time, place, and notice of such sale, and how the same shall be published.² (See form No. 99).

4. Again the statute provides that "if any goods or effects seized as the property of the debtor, other than vessels, shall be claimed by or in behalf of any other person as his property, the sheriff shall summon and swear a jury to try the validity of such claim, in the same manner and with the like effect as in case of seizure under execution." "If, by their inquisition, the jury find the property of the goods and effects so seized to be in the person so claiming them, the sheriff shall forthwith deliver them to the claimant or his agent, unless the attaching creditor shall by bond, with sufficient sureties, indemnify the sheriff for the detention of such goods and effects. In case of such indemnity, the sheriff shall detain such goods and effects, to be disposed of as hereinafter directed." "If the property in such goods be found to be in the claimant, the costs and charges arising from such inquisition, to be allowed by the officer issuing the warrant, shall be paid by the attaching creditor; but if it be found to be in the debtor, then the costs and charges, to be ascertained in the same manner, shall be paid by the claimant."³

5. The jury, to be summoned by the sheriff, must consist of twelve qualified jurors; and, before they proceed with the inquisition, they are to be sworn by the sheriff. Notice should be given to the parties of the time and place of the hearing; and the attendance of witnesses may be compelled by subpoenas out of the court from which the attachment issues. The sheriff is to swear the witnesses, but takes no part in the determination of the issue. After hearing the testimony, the jurors should

¹ *Davis v. Ainsworth*, 14 How., 346.

² 3 R. S., (5th ed.), 83, § 29.

³ 3 R. S., (5th ed.), 80, §§ 10, 11, 12.

deliberate apart, as in other cases, and should make and sign an inquisition, stating in whom they find the property to be; which inquisition should also be signed by the sheriff.¹

6. If the jury find the property to be in the claimant, and no bond of indemnity be given by the plaintiff, the sheriff will be thereby justified in returning that the defendant had no goods within his bailiwick, although it should afterwards appear that the goods were the defendant's; unless it is shown that the sheriff did not act in good faith. But, if the plaintiff tender a sufficient bond of indemnity to the sheriff, an inquisition will not justify that officer in returning that the defendant had no goods, if the fact turn out to be otherwise.² The inquisition is not conclusive, as against the claimant, and does not settle the right of property; so that, where the jury find the property not to be the claimant's, he may, nevertheless, if he be the real owner, have an action for damages against the sheriff, and that officer can introduce the inquisition in evidence, only to show that he had not acted maliciously, and in mitigation of damages. The finding of the jury in the sheriff's favor will not justify him in taking the goods of a stranger.³

7. Where the property to be attached is manifestly in the possession of a third person, who claims the same, the sheriff may require a bond of indemnity from the plaintiff, before making the levy, without going through the form of summoning a jury.⁴

8. "When a vessel belonging to any port or place in this state, or any of the United States, or any share or any interest, in such vessel, shall be attached, on the applica-

¹ Crocker on Sheriffs, § 438.

² Lummis v. Kasson, 43 Barb., 373; Rogers v. Wier, 34 N. Y. R., 463; Bayley v. Bates, 8 John., 185; Van Cleef v. Fleet, 15 John., 147.

³ Bayley v. Bates, 8 John., 185; Townsend v. Phillips, 10 John., 98; see Lummis v. Kasson, 43 Barb., 373.
⁴ Chamberlain v. Beller, 18 N. Y. R., 115.

tion, within thirty days thereafter, of any person claiming such vessel or share, or of his agent, the officer who issued the warrant may cause the vessel or share so seized to be valued by three indifferent men, to be appointed by such officer.”¹

9. “Within two days after such appraisement shall be made, the claimant, or his agent, may execute a bond, with sureties, to be approved by such officer, to the people of this state, in a penalty double the amount of such appraised value, conditioned that, in a suit to be brought on such bond, the claimant will establish that he was the owner of such vessel or share at the time of the seizure; and, in case of his failure to do so, that he will pay the amount of such valuation, with interest, from the date of the bond, to any trustees who may be appointed on such attachment; or, in case none be appointed according to law, or the attachment be discharged, to such debtor or his personal representatives.”² (See form No. 103).

10. “Upon such bond being executed and delivered to such officer, he shall order the vessel or share so seized to be discharged from the attachment, and the sheriff shall discharge such vessel or share accordingly.”³ (See form No. 104).

11. “Whenever a foreign vessel, or share or interest in any foreign vessel shall be attached, such vessel or such share or interest may be valued in the manner above prescribed, upon the application of any person who shall, by his affidavit, swear that he is the owner thereof, or upon the application of the agent of such owner, who shall, by his affidavit, swear that he is such agent, and that he verily believes his principal to be the owner of the vessel, or share so attached.”⁴

¹ 3 R. S., (5th ed.), 81, § 15.

² Id., § 16.

³ 3 R. S., (5th ed.), 81, § 17.

⁴ Id., 82 § 20.

12. "Such notice of such application shall be given to the attaching creditors, as the officer to whom the same is made shall deem reasonable."¹

13. "Within three days after such valuation shall be returned to the officer who directed the same, the creditors, at whose instance the attachment issued, shall execute a bond, with sureties, to be approved by such officer, to the person in whose behalf such claim shall be made, in double the amount of the valuation, with a condition to prosecute such attachment to effect, and to pay such damages as may be recovered against them, for seizing the said vessel, or share, in any suit that shall be brought against them within three months from the date of the bond, if it shall appear in such suit that the vessel, or share or interest therein, so attached, belonged, at the time of issuing such attachment, to the person in whose behalf such claim shall be made."²

14. "Unless such bond be given as above prescribed, the officer who issued the attachment shall grant an order discharging the vessel, share, or interest so claimed from such attachment, and the same shall be discharged accordingly."³

15. "If, after an attachment has been levied upon a foreign vessel, a valuation of the same, or of the share or interest therein seized, be made, no other warrant of attachment shall issue against the same vessel, as being the property, in whole or in part, of the same debtor, until the security above prescribed shall be given by the person requiring such warrant."⁴

16. "If, after the execution of any such bond by an attaching creditor, the attachment shall be discharged, or the proceedings shall cease, by the omission to appoint

¹ 3 R. S., (5th ed.), 82, § 21.

² Id., § 22.

³ 3 R. S. (5th ed.), 82, § 23.

⁴ Id., § 24.

trustees according to law, the debtor against whom such attachment issued, or his agent, shall be entitled to claim such vessel, share or interest, or the proceeds thereof if the same shall have been sold, only upon his discharging the bond so executed by such attaching creditor, or by his executing to such creditor a bond, in a penalty double the valuation made as herein directed, with sureties to be approved by the officer who issued the attachment, conditioned to indemnify such creditor against all charges and expenses in consequence of the bond so executed by him.”¹

17. “If the bond of the attaching creditor be not discharged, or he be not indemnified as above directed, within one month after the debtor became entitled to claim such vessel, share, or interest, as above prescribed, such vessel, share or interest may be sold by the sheriff in whose custody the same may be, upon an order of the officer who issued the attachment, and the proceeds of the sale shall be paid to the attaching creditor, who executed such bond for his indemnity.”²

18. “If no claim be made by any owner of a domestic vessel, or of a share in such a vessel, seized under any warrant of attachment, within thirty days after such seizure, and no bond be executed as herein directed by such claimant; or, if no claim be made within that time, by or in behalf of the owner of any foreign vessel, or of a share therein, so seized, such vessel or share may be sold by the sheriff making such seizure under an order of the officer issuing the attachment, to be granted upon the application of any attaching creditor, whenever, in the opinion of such officer, a sale may be necessary.”³

19. “When a share in any vessel, foreign or domestic,

¹ 3 R. S., (5th ed.), 82, § 25.

² Id., 83, § 26.

³ 3 R. S. (5th ed.), 83, § 27.

shall be seized, if no claim to such share be made by any owner thereof, as herein provided, within thirty days after such seizure, it may be sold by the sheriff, under an order of the officer issuing the attachment, to be granted on the application of any joint owner, or of his agent.”¹

20. “Whenever a sale of perishable property, or of a vessel, or share of a vessel, shall be ordered by any officer, as herein authorized, he shall, in such order, prescribe the time, place and notice of such sale, and how the same shall be published.”² (See form No. 99).

¹ 3 R. S. (5th ed.), 83, § 28.

² Id., § 29.

SECTION IX.

EFFECT OF AN ATTACHMENT.

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| <ol style="list-style-type: none"> 1. When attachment binds property. 2. As to priority of attachments. 3. What essential to make priority available. 4. Priority covers only amount actually due. 5. When subsequent attaching creditors may move to vacate. | <ol style="list-style-type: none"> 6. Plaintiff or sheriff may show fraud in assignment. 7. Effect of attachment as to defendant's title. 8. Goods subject to a lien, how attached. 9. Attaching property not a satisfaction of the debt. |
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1. The mere issuing of an attachment, and placing it in the sheriff's hands, has no force as against the defendant's property, either with reference to his rights or to those of third persons; but its effect is to be dated from the time of its actual service,¹ both as to personal or real estate.² When judgment is obtained in the attachment suit, the lien thereof relates back to the time of the levy, taking its priority from that time;³ and when the execution is issued it must be directed to, and executed by the sheriff who served the attachment, notwithstanding he may since have gone out of office.⁴

2. But where several attachments, issued under the Code, against the same defendant, are actually levied on the same property, the one first delivered to the sheriff has priority, though it was the one last levied. The provision of 2 Revised Statutes, 366, sections 14, 15, that in case of the delivery of several attachments out of courts

¹ Drake on Attach., § 221.

² Kuhlman v. Orser, 5 Duer, 250; Burkhardt v. McClellan, 15 Abb., 243, note; Learned v. Vandenberg, 7 How., 379; 8, How., 77.

³ Wilson v. Forsyth, 24 Barb., 105; Am. Ex. Bank v. Morris canal, etc., 6 Hill, 362.

⁴ McKay v. Harrower, 27 Barb., 463.

of record against the same defendant, the one first delivered should have preference, notwithstanding a levy on the same property might be first made under another attachment or execution, applies to attachments under the Code. But, in order to give such priority, the attachment first delivered must be actually levied on the *same* property as the other.¹ Therefore, where several attachments against the same defendant were successively delivered to the sheriff, and were levied upon the personal property only, except the last, which was levied upon the real estate, it was held that the levy under the latter gave it a preference, notwithstanding the others had been first issued and delivered.²

3. But, to make such priority available, as against subsequent attaching creditors, it seems that the plaintiff must recover judgment in due form and course of law, issue execution thereon and charge the property therewith. Hence, it was held, in Vermont, that where the first of several attaching creditors, having a claim large enough to absorb all the property attached, made an agreement with the defendant whereby he took all the property in satisfaction of his debt, and discontinued his action, that, as against subsequent attaching creditors, who had perfected their lien by judgment and execution, he acquired no title to the property.³

4. The object of an attachment is to secure a debt actually due, and has no reference to a judgment which may, according to the practice of the court, be recovered as a security for a debt thereafter to become due. Therefore, in an action on a money bond, payable in installments, where there was only one installment due at the time the

¹ *Yale v. Matthews*, 12 Abb., 379, 20 How., 430; *Learned v. Vandenberg*, 7 How., 379, per Harris, J.

² *Ransom v. Halcott*, 18 Barb., 56.

³ *Brandon Iron Co. v. Gleason*, 24 Vermont, 228; see *Drake on Attach.*, § 262.

attachment was issued and levied, but another installment had become due at the time of entering judgment, it was held that the plaintiff's lien, as against other attaching creditors, who had levied after the first attachment, but before judgment, was only to the extent of the amount actually due upon the bond at the time of the service of the attachment.¹

5. While it is well settled that subsequent attaching creditors cannot take advantage of mere irregularities in the plaintiff's proceedings,² yet, if the prior attachment is founded on fraud, or any thing that amounts to a fraud upon the rights of other creditors, they may move to have such attachment vacated. Thus, where A issued an attachment against one member of a firm, and seized the partnership property; and, thereupon, the firm requested D, a creditor of the firm, to accept a confession of judgment, and levy on the attached property, and thereby gain priority over A, the court set aside the judgment as intended to defraud creditors. Whereupon D issued an attachment on his claim against the partnership, and levied it on the attached property, but took no further steps in the action for over four months; thus leaving his attachment dormant. The court held the facts sufficient to justify the inference that D's attachment was levied solely to hinder and delay creditors, and set it aside on motion.³

6. It may now be considered as settled, in this state, that a creditor, by attaching property, acquires such a specific lien on the property attached, as will entitle him to the intervention of the equitable jurisdiction of the court, to remove or set aside all fraudulent assignments, transfers

¹ *Syracuse Bank v. Covelle*, 19 How. 385. *Ketchum v. Ketchum*, 1 Abb., N. S., 157.

² *In re Griswold*, 1 3Barb., 412; ³ *Reed v. Ennis*, 4 Abb. 393.
Isham v. Ketchum, 46 Barb., 48;

and claims, or any other fraudulent obstacle in the way of the realization of the lien, in case the plaintiff should recover judgment.¹ And, also, that the sheriff, as bailee of the plaintiff, has a like lien; and may show, in an action against him for wrongfully taking the property, that the purchase from the debtor was fraudulent and void as against the attaching creditors.²

7. The levy of an attachment does not divest the defendant of his title thereto, nor give the plaintiff any estate therein. It only creates a lien on the property, and does not deprive the defendant of his power of alienation, subject, however, to the lien of the attachment.³

8. Nor can the attaching creditor acquire any greater interest or right in the property seized than the defendant had at the time of the attachment, unless the defendant's rights have been impaired by some fraud or collusion.⁴ Therefore, where the goods are subject to a lien, at the time of the levy, the plaintiff acquires no interest as against the interests of the lien holder; and the sheriff cannot take possession of them until the lien is discharged. The goods may be attached, however, subject to the lien, by the service of a certified copy of the warrant, and a notice as provided by section 235.⁵

9. The levy under an attachment does not amount to a satisfaction of the debt, and, therefore, if the property attached be lost or destroyed, during the pendency of the action, without any fault of the sheriff, or plaintiff, the defendant must bear the loss and will still remain liable for the plaintiff's claim.⁶

¹ *Rinchey v. Stryker*, 26 How., 75; *Kelley v. Lane*, 28 How., 128; *Greenleaf v. Mumford*, 30 How., 30; *Frost v. Mott*, 34 N. Y. R., 253.

² *Id.*

³ *Drake on Attach.*, § 222.

⁴ *Id.*, § 223.

⁵ *Frost v. Willard*, 9 Barb., 440; *Brownell v. Carnley*, 3 Duer, 9.

⁶ *McBride v. Farmers' Bank*, 28 Barb., 476.

SECTION X.

JUDGMENT HOW SATISFIED. ACTIONS BY PLAINTIFF. WHERE
JUDGMENT IS FOR DEFENDANT.

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| <ol style="list-style-type: none"> 1. § 237. Judgment, how satisfied. 2. Sheriff to retain property and apply on execution. 3. Where defendant dies, who may order execution. 4. Execution where sheriff's term of office has expired. 5. Proceeds of perishable property and debts first applied. 6. Sheriff to sell attached property. 7. To collect debts. 8. When to sell evidences of debt. 9. Notice of application for leave to sell to be given defendant. 10. How application made. | <ol style="list-style-type: none"> 11. Sheriff to give certificate of sale of share in stock. 12. Where property has passed out of sheriff's hands. 13. Penalty for withholding or concealing property. 14. Sheriff to deliver residue to defendant. 15. Where property is lost pending suit. 16. § 238. When plaintiff may maintain action. 17. Must comply with the section. 18. § 239. Where defendant recovers judgment. 19. Must be final judgment. |
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1. "In case judgment be entered for the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose. 1. By paying over to such plaintiff the proceeds of all sales of perishable property, and of any vessel, or share or interest in any vessel, sold by him, or of any debts or credits collected by him; or so much as shall be necessary to satisfy such judgment. 2. If any balance remain due, and an execution shall have been issued on such judgment he shall proceed to sell, under such execution, so much of the attached property, real or personal, except as provided in subdivision four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a

certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto, which were had by such defendant. 3. If any of the attached property belonging to the defendant shall have passed out of the hands of the sheriff, without having been sold or converted into money, such sheriff shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the attachment; and any person who shall willfully conceal or withhold such property from the sheriff, shall be liable to double damages, at the suit of the party injured. 4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes and other evidences of debt, and the debts that may have been seized or attached under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment. At the expiration of six months from the docketing of the judgment, the court shall have power, upon the petition of the plaintiff, accompanied by an affidavit setting forth fully all the proceedings which have been had by the sheriff since the service of the attachment, the property attached, and the disposition thereof, and also the affidavit of the sheriff that he has used diligence and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected of the same, any part or portion thereof, to order the sheriff to sell the same, upon such terms and in such manner as shall be deemed proper. Notice of such application shall be given to the defendant or his attorney, if the defendant shall have appeared in the action. In case the summons has not been personally served on the defendant, the court shall make such rule or order as to the service of notice, and the time of service as shall be deemed just. When the judgment and all costs of the

proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property, or the proceeds thereof.”¹ The portion of subdivision four, which provides for the sale of uncollected assets was added in 1859, otherwise the section remains unchanged.

2. Where property is seized by the sheriff under an attachment, he must retain it in his possession until the determination of the action in which the attachment was issued, and if the plaintiff recovers judgment, until the property is sold under an execution issued thereon; unless the judgment is otherwise satisfied, or unless, in case of perishable goods, etc., he is ordered by the officers who issued the attachment, to sell the same. If he has the goods when a proper execution is lodged with him, and proceeds to sell thereon, it is all the plaintiff has a right to require of him.²

3. Where the defendant in the attachment suit dies after the allowance of the attachment and before judgment, the right to order an execution is with the court in which the action is pending, and not with the surrogate. The execution should be indorsed with a direction to levy only upon the property attached.³

4. When the execution is issued, it must be directed to, and executed by the sheriff who served the attachment, notwithstanding he may since have gone out of office. The execution, issued in such a case, should be a special one, directed to the former sheriff as such, reciting the issuing of the attachment, and the taking of the property thereon, and requiring the sale of that property by him. Such former sheriff is not bound to deliver the property to his successor in office to be sold on an execution di-

¹ Code, § 237.

³ Thacher v. Bancroft, 15 Abb.,

² McKay v. Harrower, 27 Barb., 243.
463; Dodge v. Porter, 13 Abb., 253.

rected and delivered to the latter, and cannot be made liable for a refusal so to deliver it. Nor can he be placed in default with regard to the attached property, until a proper execution has been put in his hands, directing a sale of the property seized.¹ If the attached property, in such case, be not sufficient to satisfy the judgment, a supplementary or alias execution should be issued to the *sheriff* directing him to sell the defendant's property generally. There is a statement in the *Syllabus* to *McKay v. Harrower*, to the effect that such direction may be included in the *special execution* to the *late sheriff*, but there is nothing in that *decision* to authorize it, and it is obviously incorrect. (For form, see No. 111).

5. Where the judgment is for the plaintiff, and an execution is issued to the sheriff, he must first apply thereon all moneys received by him, from sales of the attached property previously made, or from any debts or credits collected by him, or so much thereof as may be necessary to satisfy the judgment.²

6. If a balance still remain due, the sheriff must sell all the attached property, real and personal, except the evidences of debt, or so much thereof as may be necessary.³

7. If such property is insufficient, the sheriff should proceed to collect the debts, notes, bonds, or other evidences of debt that have been attached; and prosecute any bond that may have been taken in the course of the proceeding, and apply the proceeds to the payment of the judgment.⁴

8. Should the judgment remain unsatisfied at the expiration of six months from the docketing of the judgment, the court may order the sheriff to sell such part of the

¹ *McKay v. Harrower*, 27 Barb., 463; *Dodge v. Porter*, 13 Abb., 253.

² Code, § 237.

³ Code, § 237.

⁴ Id.

evidences of debt as remain uncollected, upon such terms and in such manner as shall be deemed proper.¹

.9 Notice of the application for leave to sell such evidences of debt, must be given to the defendant. If he has appeared in the action, the usual notice of eight days must be served upon him or his attorney. But if the summons has not been personally served on the defendant, the court will make an order as to the service of notice and the time of service.²

10. The application must be made upon the following papers: 1. The petition of the plaintiff. 2. An affidavit setting forth fully all the proceedings had by the sheriff, since the attachment, the property attached, and the disposition thereof. 3. The affidavit of the sheriff that he has used diligence, and endeavored to collect the evidences of debt, attached by him, and that there remains uncollected of the same, some part or portion thereof.³

11. In case of the sale of any rights, or shares, in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto, which were had by such defendant.⁴

12. If any of the attached property shall have passed out of the sheriff's hands, without having been sold, or converted into money, such sheriff shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the attachment.⁵ Where property has been once seized by the sheriff, he may follow and retake it in another county, or even in another state.⁶

13. Any person who shall willfully conceal, or withhold

¹ Code, § 287.

² Id.

³ Id.

⁴ § 287.

⁵ Id.

⁶ *Utley v. Smith*, 7 Vermont, 154.

such property from the sheriff, shall be liable to double damages at the suit of the party injured.¹

14. When the judgment, and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant, the residue of the attached property, or the proceeds thereof.²

15. The attachment of property, is not in itself a satisfaction of the plaintiff's demand, since the property is seized merely as a security for the satisfaction of such judgment as the plaintiff may recover; therefore, if pending the suit, the attached property be lost or destroyed, without fault of the plaintiff or sheriff, the defendant will still remain liable.³

16. "The actions herein authorized to be brought by the sheriff, may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. Such sureties shall, in all cases, when required by the sheriff, justify by making an affidavit that each is a householder, and worth double the amount of the penalty of the bond, over and above all demands and liabilities."⁴ (See form No. 105).

17. The above section must be strictly complied with, before the plaintiff can maintain the action, and the fact of such compliance should be set forth in the complaint.⁵

18. "If the foreign corporation, or absent or absconding or concealed defendant recover judgment against the plaintiff in such action, any bond taken by the sheriff,

¹ Code, § 237.

² Id.

³ McBride v. Farmers' Savings Bank, 7 Abb., 347; 28 Barb., 476.

⁴ Code, § 238.

⁵ Skinner v. Stewart, 39 Barb., 206; 15 Abb., 391; 24 How., 489.

except such as are mentioned in the last section, (§ 238), all the proceeds of sales and moneys collected by him, shall be delivered by him to the defendant, or his agent, on request, and the warrant shall be discharged, and the property released therefrom.”¹

19. Judgment for the defendant is not, *per se*, a discharge of the attachment; for in case such judgment is appealed from, its force is suspended pending such appeal.² But a *final* judgment for the defendant dissolves the attachment, and necessarily discharges from its lien the effects or credits on which it may have been executed, whether in the hands of the sheriff, or of third persons.

¹ Code, § 239.

² Lee v. Selleck, N. Y. Trans. Dec., 23, 1859.

SECTION XI.

DISCHARGE OF ATTACHMENT.

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| <ol style="list-style-type: none"> 1. § 240. Discharge of attachment. 2. § 241. Undertaking on part of the defendant. 3. Two methods of obtaining discharge. 4. By motion on plaintiff's papers. 5. Such papers to be taken as true. 6. Who may make the motion. 7. When the motion may be made. 8. To whom the motion may be made; notice. 9. Where plaintiff cannot introduce new affidavits. 10. When attachment set aside plaintiff becomes a trespasser. 11. Where facts in plaintiff's affidavit are not positive. 12. When defendant may renew motion to discharge. 13. Motion on opposing affidavits. 14. To whom made; notice. 15. Plaintiff may oppose by affidavits. 16. But cannot introduce new grounds. 17. When issued against a resident on ground that he is non-resident. 18. Court will not try the merits of the action. | <ol style="list-style-type: none"> 19. Where plaintiff's undertaking and affidavits have not been filed. 20. Where the cause is removed to the United States court. 21. Effect of undertaking under § 241. 22. Where attachment vacated will not be again granted on same facts. 23. Discharge on security; motion when made. 24. Motion <i>ex parte</i>. 25. Form of the undertaking. 26. To be proved or acknowledged; sureties to justify. 27. Who may be sureties. 28. Sureties <i>estopped</i> by undertaking. 29. Defendant may give undertaking before service of attachment. 30. Sureties cannot allege fraud on part of defendant. 31. May move to set aside on affidavit after giving undertaking. 32. How appraisement to be made. 33. Within what time judge to decide motion to vacate. |
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1. "Whenever the defendant shall have appeared in such action, he may apply to the officer who issued the attachment, or to the court, for an order to discharge the same; and, if the same be granted, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered or paid by him to the defendant or his agent, and released from the attachment. And where there is more than one defendant, and several property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may

apply to the officer who issued the attachment for relief under this section.”¹ The last clause, relating to several defendants, was added in 1862.

2. “Upon such application, the defendant shall deliver to the court or officer an undertaking executed by at least two sureties, who are residents and freeholders, or householders, in this state, approved by such court or officer, to the effect that the sureties will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which shall be at least double the amount claimed by the plaintiff in his complaint. If it shall appear by affidavit that the property attached be less than the amount claimed by the plaintiff, the court or officer issuing the attachment may order the same to be appraised, and the amount of the undertaking shall then be double the amount so appraised. And in all cases the defendant may move to discharge the attachment, as in the case of other provisional remedies. And where there is more than one defendant, and several property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may deliver to the court or officer an undertaking in accordance with the provisions of this section, to the effect that he will, on demand, pay to the plaintiff the amount of judgment that may be recovered against such defendant. And all the provisions of this section applicable to such undertaking shall be applied thereto.”² The concluding provision was added in 1862. The first sentence formed the whole section in 1849. The intermediate portion was added in 1857.

3. Prior to the amendment of the above section, in 1857, the Code provided no specific means for discharging

¹ Code, § 240.

² Code, § 241.

an attachment otherwise than by giving security. But, by that amendment, it was provided that, "in all cases, the defendant may move to discharge the attachment, as in the case of other provisional remedies." There are, therefore, two methods for obtaining a discharge of the attachment: 1. By a motion for that purpose, based either upon the plaintiff's application and proceedings, or upon opposing affidavits. 2. By giving security to the plaintiff. The first of these methods is appropriate when there is any defect or irregularity in the plaintiff's proceedings, or when the attachment is not properly allowable on the merits. The second, when the plaintiff's right to the remedy is not controverted, but the defendant desires to retain the possession of the property seized. These two methods will be considered in the order in which they are stated.

4. Where there are irregularities or defects in the plaintiff's application or proceedings the defendant should move on the plaintiff's papers alone. In such case the plaintiff cannot introduce additional affidavits to strengthen his case; but the attachment must stand or fall upon the facts originally presented to the judge who granted the warrant.¹ There is, however, one exception to this rule, to the effect that where there has been a change in the relation and condition of the parties since the attachment was issued, such change may be shown by additional affidavits on the part of the plaintiff.²

5. Where the motion to vacate is based solely on the plaintiff's papers, such papers will be taken as true, being uncontradicted, and if they establish a *prima facie* case, the attachment should stand; but they will be strictly construed against the plaintiff.³

¹Hill v. Bond, 22 How., 272;
Brewer v. Tucker, 13 Abb., 76;
Dickinson v. Benham, 20 How., 343,
12 Abb., 158.

²Dickinson v. Benham, *supra*.
³Hathorn v. Hall, 4 Abb., 227;
Moers v. Morro, 17 How., 280, 29
Barb., 361.

6. The defendant is the proper person to make such motion, as a third party can take no advantage of the plaintiff's irregularities; but if the defendant has parted with his interest in the property attached, as by an absolute and unconditional sale he cannot move to discharge.¹ The fact, however, that the defendant has made an assignment of the goods for the benefit of creditors, either before or after the attachment, will not preclude his making the motion, as he has a residuary interest in the proceeds of such goods after his creditors are paid.² A subsequent attaching creditor cannot move to discharge an attachment issued in a prior suit, on the ground that it was irregularly issued. He has no standing in court to make such a motion by petition or otherwise.³ Nevertheless, if the prior attachment is founded on fraud, or any thing that amounts to a fraud, upon the rights of other creditors, they may move to have such attachment vacated.⁴

7. As in case of other provisional remedies the defendant may move to vacate at any time before judgment, and it is held that he may make such motion even after judgment.⁵ But if the motion is for irregularities in the application or proceeding it should be made at once, or it will be deemed to have been waived. Thus, where an attachment is issued against one as a non-resident debtor, when, in fact, he is a resident, it is an irregularity merely and must be taken advantage of at the first opportunity, or it will be waived.⁶

8. Where the warrant was granted by a judge upon an *ex parte* application, the motion to vacate the same, based upon the plaintiff's papers solely, may be made to such

¹ Furman v. Walter, 13 How., 350.

² Brewer v. Tucker, 13 Abb., 76;
Dickerson v. Benham, 20 How., 343;
10 Abb., 390; Gasherie v. Apple, 14
Abb., 64.

³ Isham v. Ketchum, 46 Barb., 43;

Ketchum v. Ketchum, 1 Abb., N. S.,
157.

⁴ Reed v. Ennis, 4 Abb., 393.

⁵ Thompson v. Culver, 15 Abb., 97;
24 How., 286; 38 Barb., 442.

⁶ Lawrence v. Jones, 15 Abb., 110.

judge, at chambers, without notice, or it may be made to the court, upon the usual notice of eight days.¹ The power of a judge to vacate a warrant, *ex parte*, should be most carefully exercised, and an order once granted should not be vacated or set aside, without notice to the adverse party, except in extreme cases where the delay required by the notice would work great injury. Where the motion is made on notice, a county judge has no authority to hear it.² (See forms of notice, appendix No. 106).

9. Where the motion to vacate the attachment is made on the original papers, and the defendant makes an affidavit to procure an order to show cause, instead of giving the ordinary notice, this will not entitle the plaintiff to introduce new affidavits.³

10. Where the attachment is set aside for irregularity, it will afford no justification to the party at whose instance it was issued, and he becomes a trespasser *ab initio*, and the return of the property will only go in mitigation of damages. But if the warrant is regular on its face, and issued by competent authority, it will protect the officer.⁴ The court may require, as a condition of setting aside the attachment, that the defendant stipulate that he will not bring any action on account of the issuing of the attachment, other than an action on the undertaking, filed when the attachment was issued for such actual damages as he may have sustained.⁵

11. Where the material facts in the plaintiff's affidavits are sworn to from information and belief, the attachment issued thereon will be set aside as irregular.⁶

¹ Code, § 324; see *Cayuga Bank v. Warfield*, 13 How., 440.

² *Rogers v. McElhone*, 20 How., 441; 12 Abb., 292.

³ *Brewer v. Tucker*, 13 Abb., 76.

⁴ *Kerr v. Mount*, 28 N. Y. R., 659.

⁵ See *Rigney v. Tallmadge*, 17 How., 556; *Decker v. Judson*, 16 N. Y. R., 446; *Williams v. Riel*, 5 Duer, 603.

⁶ *Hill v. Bond*, 22 How., 272; *Brewer v. Tucker*, 13 Abb., 76.

12. Where the defendant moves for a vacation on the plaintiff's papers, without introducing any opposing affidavits, and fails in his motion, he may, if a proper case be shown, have leave to renew his motion on the merits. It rests, however, in the discretion of the court, and will not generally be granted, unless good faith be shown, and strong reason for such indulgence. As a general rule, the party moving for specific relief is bound, on such application, to present his whole case, and to exhaust all his grounds for interference.¹

13. Where the plaintiff's proceedings are regular, and his application establishes a *prima facie* case, the defendant must base his motion for a vacation of the warrant, upon facts extrinsic to the case, as made by the plaintiff. Such facts may be presented by affidavits.² The decisions to the contrary, are superseded by the amendment of 1857. Such affidavits may show a want of jurisdiction, or insufficiency in the plaintiff's case, or may contradict the statements of the latter, so as to determine generally, the propriety of granting the attachment.³

14. Where the motion is made by the defendant upon affidavits, it must be made to the court, and on a notice of eight days. A county judge has no power to hear such motion.⁴

15. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the warrant was granted.⁵

16. It is not yet fully settled whether the plaintiff may, in addition to rebutting the defendant's affidavits, state ad-

¹ Desmond v. Woolf, 6 Leg. Obs., 389.

³ Boscher v. Roullier, 4 Abb., 396.

² Houghton v. Ault, 16 How., 77 ;
Brewer v. Tucker, 13 Abb., 76 ;
Hill v. Bond, 22 How., 272.

⁴ Rogers v. McElhone, 20 How., 441 ; 12 Abb., 292.

⁵ Code, §§ 205, 241.

ditional facts upon which the attachment can be sustained.¹ It may be safely stated, however, that the plaintiff should be strictly limited to controverting the defendant's affidavits, or to supporting his original cause; and that he cannot introduce grounds in support of the remedy, different from those adduced at the outset.²

17. The issuing of an attachment against a debtor on the ground that he is a non-resident when, in fact, he is a resident of the state is an irregularity only, and must be taken advantage of at the earliest opportunity, or it will be waived.³ Where a defendant residing in Canada, was inveigled into this state by a trick for the purpose of effecting a service of a summons upon him, the service of the summons and all proceedings dependent thereon, were set aside and a warrant of attachment vacated.⁴

18. While every allegation on which the attachment was granted may be disproved by the defendant on a motive to vacate, the court will not on such motion try the merits of the action in which the attachment is issued.⁵

19. If the plaintiff's undertaking and affidavits used on the application for the attachment have not been filed within the time required by the rule of the court, the defendant may move the court to vacate the proceedings for irregularity, with costs.⁶ But where the plaintiff inadvertently omits to comply with this rule, he may be permitted to cure the defect, with or without costs, even upon the hearing of the motion to vacate.⁷

¹ It is held in the following cases that he can: *Furman v. Walter*, 13 How., 348; *Genin v. Tompkins*, 12 Barb., 282; *Morgan v. Avery*, 7 Barb., 656; see contra, *Dickinson v. Benham*, 19 How., 410; *Wilson v. Britton*, 6 Abb., 34.

² *Granger v. Schwartz*, 11 Leg. Obs., 346; *N. Y. & Erie Bank v. Codd*, 11 How., 221; *Wilson v. Britton*, 6 Abb., 33.

³ *Lawrence v. Jones*, 15 Abb., 110.

⁴ *Metcalf v. Clark*, 41 Barb., 45; see *Garbutt v. Hanff*, 15 Abb., 189.

⁵ *Bank of Commerce v. Rutland R. R.*, 10 How., 6; *Boscher v. Roullier*, 4 Abb., 396.

⁶ Sup. Court, rule 4.

⁷ *Kissam v. Marshall*, 10 Abb., 424; and see *Leffingwell v. Chave*, 5 Bosw., 703; 19 How., 55; 10 Abb., 472.

20. Where the cause is removed into the United States court, subsequent to the issuing of the attachment, such attachment is not thereby discharged. The statute preserves its force, but any subsequent steps necessary in relation to it should be the subject of a special application.¹

21. The giving of an undertaking under section 241, has the effect of waiving all irregularities; but it does not destroy the defendant's right to move, to vacate on the ground of a fatal objection.²

22. Where an attachment has been vacated on motion of the defendant, and on the merits, another application by the plaintiff on substantially the same facts, whether before the same or another court, will not be entertained.³

23. Where the plaintiff's proceedings are regular and the attachment has been properly issued, the defendant can only have a discharge thereof upon giving the security as required by the foregoing section. The motion cannot be made until the defendant shall have appeared in the action; but it may be made at any time afterwards and before judgment. It is too late for the defendant to avail himself of the remedy, after judgment for the plaintiff in the action, even though an appeal has been taken.⁴

24. The application is purely *ex parte*, but the court may and ordinarily should, direct that notice be given to the plaintiff. Should he attend, he may be heard in opposition to granting the discharge, but he is heard only as a matter of favor, and not of strict right.⁵ Nor has

¹ *Carpenter v. N. Y. & N. Haven R. R. Co.*, 11 How., 481.

² *Garbutt v. Hanff*, 15 Abb., 189; see, however, *Haggart v. Morgan*, 4 Sandf., 198; *Aff'd 1 Seld.*, 422.

³ *Schlemmer v. Myerstein*, 19 How., 412.

⁴ *Spencer v. Rogers's Locomotive Works*, 13 Abb., 180.

⁵ *Sanborn v. Elizabethport Manufacturing Co.*, 22 How., 106; 13 Abb., 433.

the plaintiff any right to except to the sureties in the undertaking; but the court should require the usual justification and acknowledgment on their part.¹ (See form No. 107).

25. Before the defendant is entitled to a discharge of the attachment he must present to the officer or court an undertaking executed by at least two residents and freeholders or householders in this state. Where the property attached is equal to, or exceeds the plaintiff's claim, the undertaking is to be in double the amount claimed by the plaintiff in his complaint, but if it is made to appear, by affidavit, that the property is less than the amount claimed by the plaintiff, it is to be appraised, and the undertaking given for double the amount so appraised. (See form No. 108).

26. The undertaking should have attached thereto or indorsed thereon an affidavit, by the sureties, to the effect that they are residents and householders, or freeholders, in this state, and worth severally the sum specified in the undertaking over all debts and liabilities. And the undertaking must be proved or acknowledged in like manner as deeds of real estate.² However, a defective compliance, or non-compliance with this rule, may be remedied by amendment.³

27. It is not essential that the defendant should be a party to the undertaking. It has been held that co-defendants, jointly liable upon the demand in suit, but who are residents, are not disqualified from being sureties in the undertaking.⁴ Also, that if one of the sureties in an undertaking of this kind becomes insolvent, the court has no power to order additional sureties.⁵ Where the

¹ See rule 6.

² Sup. Court, rule 6.

³ Conklin v. Dutcher, 5 How., 386;
¹ Code R. (N. S.), 49.

⁴ Mortimer v. Brunner, cited in Hoff. Pro. Rem., 456.

⁵ Dudley v. Goodrich, 16 How., 189; 7 Abb., 26.

plaintiff, on affidavits showing that one of the sureties in an undertaking given under this section, was an infant at the time he executed the same, obtained an order to strike out the defendant's answer in the action, unless he furnished an undertaking with two sufficient sureties, and such undertaking not having been filed, the plaintiff took judgment against the defendant in the action as for want of an answer, it was held that the conditions of the undertaking were broken, and the sureties liable to an action, when judgment was obtained and execution returned unsatisfied in the attachment suit; and that the proper remedy of the sureties was to have applied for leave to defend that suit for their own protection, but that the facts constituted no defense to an action against them upon the undertaking.¹

28. The sureties in the undertaking are *estopped* from impeaching its validity by disproving any fact therein recited which may be material or necessary to sustain it.² Thus, in a suit on an undertaking given to obtain the release of property seized upon an attachment regularly issued against a person as a non-resident debtor, the defendants are *estopped* from denying that the person proceeded against is a non-resident, since the fact of non-residence is not jurisdictional.³ But, where the undertaking is given to procure the discharge of an attachment which is void for want of jurisdiction of the subject matter, the whole proceeding being a nullity, the undertaking is of no effect whatever, and the sureties, when sued on it, may defend on that ground.⁴

29. Although the above section contemplates that the

¹ *Jewett v. Crane*, 35 Barb., 208; 13 Abb., 97.

² *Coleman v. Bean*, 14 Abb., 38; same case in Court of Appeals, 32 How., 370.

³ *Haggart v. Morgan*, 4 Sandf., 201; Aff'd, 5 N. Y. R., 422.

⁴ *Coleman v. Bean*, 32 How., 370; per Smith, J., *Cadwell v. Colgate*, 7 Barb., 254; *Homan v. Brinkerhoff*, 1 Denio, 184.

giving of the undertaking shall be preceded by the issuing of an attachment, and shall accompany an application to discharge it, and also directs that the undertaking shall be delivered to the court or officer, the non-compliance with those provisions is but an irregularity which the parties may waive. Therefore, the debtor may, with the plaintiff's consent, waive the issuing of the attachment and the levy under it, and give the undertaking as provided above directly to the plaintiff, and thereby save the damage to his credit, besides the annoyance and expense incident upon the seizure of his property. By such an arrangement the plaintiff will be debarred from suing out another attachment and procuring other security from the defendant in the same action, and the defendant, and his sureties will be *estopped* from repudiating the undertaking.¹

30. Nor will the sureties in such undertaking be allowed to show in an action against them on such undertaking, that they were induced to execute the same by the false and fraudulent representations of the defendant, unless it appear that the plaintiff was a party to, or knowing to, such fraud. The plaintiff, having received the undertaking upon a valid legal consideration, and being ignorant of the fraud, and in no way responsible for it, cannot be deprived of the benefit of the undertaking by any such fraud.²

31. The defendant in the attachment suit is not precluded, by giving the undertaking as herein provided, from moving to set the attachment aside on affidavits.³

32. Where the property attached is of less value than the plaintiff's demand, the appraisement should be made by the sheriff with the assistance of two disinterested free-

¹Coleman v. Bean, 32 How., 370. see otherwise, Haggart v. Morgan, 5 N. Y. R., 428.

²Id.

³Garbutt v. Hanff, 15 Abb., 189;

holders, and notice of the time and place thereof should be given to the attorney of the plaintiff.

33. Whenever a motion shall be made to vacate, modify, or set aside a warrant of attachment, it is the duty of the judge before whom such motion shall be made, to render and make known his decision on such motion within twenty days after the day upon which such motion shall have been submitted to him for his decision.¹ (For forms herein, see appendix Nos. 106 to 110).

¹Code, § 401, sub 8.

SECTION XII.

RETURN OF WARRANT. SHERIFF'S FEES. COSTS AND ALLOWANCES.

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|--|--|
| <ol style="list-style-type: none"> 1. § 242. When sheriff to return warrant, etc. 2. § 243. Sheriff's fees. 3. Liable for errors in return. 4. What fees sheriff entitled to. 5. Fees of appraisers on inventory. 6. When sheriff not entitled to fees. 7. When entitled to same compensation as trustees. 8. When to be allowed disbursements for attorneys, etc. | <ol style="list-style-type: none"> 9. Plaintiff's attorney liable for sheriff's fees. 10. Sheriff may assign claim for fees. 11. Sheriff to state items and verify. 12. Costs and allowances in the action. 13. Extra allowance, how obtained. 14. Cannot be had when attachment set aside. 15. Balance to be delivered to defendant. |
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1. "When the warrant shall be fully executed or discharged, the sheriff shall return the same with his proceedings thereon, to the court in which the action was brought."¹ (See form No 97).

2. "The sheriff shall be entitled to the same fees and compensation for services, and the same disbursements, under this title, as are allowed by law for like services and disbursements under the provisions of chapter five, title one, and part two of the revised statutes. Provided, however, that no poundage or other compensation shall be allowed to the said sheriff (except his fee of fifty cents for making the levy, and such compensation for his trouble and expense in taking possession of and preserving the property as shall be fixed by the officer issuing the attachment), unless a settlement shall be had, or a judgment shall be recovered and collected in whole or in part, in the action in which the attachment in this title referred

¹ Code, § 242.

to shall have issued. And where a judgment shall have been recovered and collected in part only, the amount of his poundage shall not be estimated upon any sum greater than the sum collected upon such judgment. And where a settlement shall be had, the amount of his poundage shall not be estimated upon any sum greater than the amount at which said settlement is made."¹ All the above section, after the first sentence was added in 1865.

3. In making the return the sheriff acts ministerially and is liable to the injured party for any error therein.²

4. The fee for serving the attachment is fifty cents, with such additional compensation for the trouble and expense of the sheriff, in taking possession of and preserving the property attached, as the officer issuing the warrant shall certify to be reasonable. The sheriff is also entitled to nineteen cents for a copy of the attachment; and twelve and a half cents for returning it. For selling any property attached and collecting the proceeds, for two hundred and fifty dollars or less, two and a half per cent; and for all over that sum, one and a quarter per cent. For advertising the same for sale, two dollars; or if the action be settled, or the sale stayed, after advertising, one dollar; and where the sale of real estate is advertised in a newspaper, the fees paid by the sheriff to the printer not exceeding the sum allowed by law.³

5. For making and returning an inventory and appraisal, such compensation is allowed to the appraisers, not exceeding one dollar to each per day, for each day actually employed, as the officer, issuing the attachment shall allow, and twenty-five cents for drafting, and twelve and a half cents for copying the inventory.⁴

¹ Code, § 243.

² *Houghton v. Swarthout*, 1 Denio, 589, and cases.

³ 3 R. S. (5th ed.), 926.

⁴ *Id.*, 3 R. S., 646, 633.

6. Where an attachment has been issued and served, a sheriff is entitled to commissions on a settlement of the action, upon the amount which the debtor pays the creditor, although it does not come to his hands, as well as his necessary disbursements.¹ But where he neither collects nor sells, and there is no settlement, he cannot claim poundage, and is merely entitled to his fee for the service of the attachment, and to his reasonable expenses, and a compensation for his trouble in taking possession of and preserving the property levied upon, to be allowed by the officer granting the warrant.² Where the property attached was a vessel, it was held that the charge for watching it ought not to be more than that allowed the United States marshal for the same service, which is two dollars and fifty cents per day.³

7. Where the attachment is levied upon property not capable of manual delivery, and the sheriff is required to perform, in respect thereto, services similar to those required of trustees under the revised statutes,⁴ he is held to be entitled to the same compensation allowed to such trustees, for like services; that is, all necessary disbursements and a commission of five per cent, on all moneys which come to his hands.⁵ But where he performs only the duties which usually devolve on a sheriff, as where he serves the attachment, by delivering a copy and notice, and the action is afterwards settled, he is entitled to only the same poundage as in ordinary cases.⁶ In a recent case it was held, that where the sheriff attached the interest of the defendant in a mining company, and the

¹ *Trenor v. Fachiu*, 20 How., 405; 12 Abb., 136; 28 How., 88, note; *Muller v. Sautler*, 28 How., 87; 18 Abb., 450.

² *Alburtis v. Dudley*, 21 How., 456; 12 Abb., 361; *Hoge v. Page*, 11 How., 207.

³ *Shipman v. Shafer*, 18 Abb., 449.

⁴ 3 R. S., (5th ed.), 119.

⁵ *Mayhew v. Duncan*, 31 Barb., 87; 10 Abb., 289; *Trenor v. Fachiu*, 28 How., 88, note, 20 How., 405.

⁶ *Jellinghaus v. Scheidt*, 18 Abb., 452; *Muller v. Sautler*, 28 How., 87; 18 Abb., 450.

parties afterwards compromised for a specific sum, he was only entitled to his fee for serving the attachment, but that he was not entitled to poundage because he had not attached any property he could sell by virtue of the attachment.¹ The decision was made, however, prior to the amendment of the above section in 1865.

8. The sheriff may employ attorneys and counsel in prosecuting actions for the collection of assets, etc., and is entitled to be paid the necessary disbursements paid them, whether he succeeds in such actions or not, provided he acts in good faith. But, if he unnecessarily employ agents and attorneys in the collection of debts that he could have collected himself, he must compensate such agents and attorneys himself, unless there is an express agreement to the contrary with all the parties interested in the proceeds.² So, if the property seized is taken out of the sheriff's hands, he will be allowed a reasonable sum for regaining the same, provided he obtain possession in a lawful manner.³

9. The attorney for the plaintiff is liable to the sheriff for his fees and compensation on attachment, and it includes such additional compensation for his trouble and expense in taking possession of and preserving the attached property as the officer issuing the warrant shall certify to be reasonable, as well as the fifty cents for serving the attachment. And in an action against the attorney to recover the same, the certificate of the officer allowing the attachment will be conclusive evidence of the amount of the sheriff's compensation.⁴

10. The sheriff may assign his claim to fees and compensation for services rendered, but not for those to be earned.⁵

¹ Calhoun v. Lee, 29 How., 1.

² Mayhew v. Duncan, 31 Barb., 87; 10 Abb., 289.

³ Rhodes v. Woods, 41 Barb., 471.

⁴ Birkbeck v. Stafford, 23 How., 236.

⁵ Id.

11. The sheriff may be required to specify in his bill of charges the nature of the disbursements, item by item, and the same should be verified by his own oath, or by that of his deputy who paid them.¹

12. The costs in the action are the usual costs prescribed by section 307 of the Code. In addition to these, there shall be allowed to the plaintiff, upon the recovery of judgment by him, in any action in which a warrant of attachment has been issued, the sum of ten per cent, as in section 309 prescribed, for any amount not exceeding two hundred dollars; an additional sum of five per cent, for an additional sum not exceeding four hundred dollars; and an additional sum of two per cent, for any additional amount not exceeding one thousand dollars. And, if the action is settled before judgment therein, like allowances upon the amount paid upon such settlement, at one-half the rates above specified;² and in difficult and extraordinary cases, where a defense has been interposed, or a trial has been had, the court may also, in its discretion, make a further allowance to any party, not exceeding five per cent upon the amount of the recovery or claim.³ The rates provided by section 308 are to be estimated upon the value of the property claimed or attached.⁴

13. No motion is necessary for the additional allowance under section 308; nor is an order necessary. The clerk enters the extra allowance, of course;⁵ but the allowance under section 309 rests in the discretion of the court, and can only be had on motion.

14. When, pending the action, the attachment is set aside, the case stands as if no warrant had been issued, and the plaintiff is not entitled to the extra allowance.⁶

¹ Mayhew v. Wilson, 10 Abb., 289;
31 Barb., 87.

² Code, § 308.

³ Code, § 309, as am'd, 1865.

⁴ § 309.

⁵ Hunt v. Middlebrook, 14 How.,
300.

⁶ Iselin v. Graydon, 26 How., 95.

But where an attachment is issued in an action, it is not necessary that property should be levied on to entitle the plaintiff to his per centage.¹

15. When the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property or the proceeds thereof.²

¹Jackson v. Figanier, 15 How., 224. ²§ 287.

CHAPTER V.

RECEIVERS, AND OTHER PROVISIONAL REMEDIES.

SECTION I. Receivers, nature of, and how appointed.

II. General powers and duties of

III. In what cases appointed.

IV. After judgment.

V. In supplementary proceedings.

VI. Receivers in creditor's suits.

VII. Receivers of corporations.

VIII. Other provisional remedies. Deposit of money, etc., in court.

IX. Satisfaction of part of claim admitted due.

SECTION I.

RECEIVERS, NATURE OF, AND HOW APPOINTED.

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. § 244. Receivers, and other provisional remedies. 2. Receiver what is, and on whose behalf appointed. 3. Resistance to, a contempt of court. 4. Appointment of, in the discretion of the court. 5. Who may, and who may not be appointed. 6. Should only be one receiver of the same property. 7. On whose application appointed. 8. When appointed before action commenced. 9. Before coming in of answer. 10. Notice of application, when not required. 11. Notice on motion to extend receiver to another action. 12. When receiver to be prayed for in complaint. | <ol style="list-style-type: none"> 13. Motion for, on what papers. 14. What moving papers must show. 15. Application to be made to the court. 16. Appointment how made; reference to appoint. 17. Order of reference to be entered and copies served. 18. Summoning parties to attend before referee. 19. Where a party summoned fails to attend. 20. Proceedings on the reference. 21. Who referee should appoint. 22. Referee to fix security. 23. Amount of security, how determined. 24. Who may be sureties. 25. Form and execution of bond. 26. Bond to be filed. 27. Referees report to the court. 28. Where either party objects to report. 29. What objections will be sufficient. |
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1. "A receiver may be appointed: 1. Before judgment, on the application of either party, when he establishes an apparent right to property, which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer, may be had without application to the court. 2. After judgment, to carry the judgment into effect. 3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his pro-

perty in satisfaction of the judgment. 4. In the cases provided in this Code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; and in like cases of the property within this state of foreign corporations. Receivers of the property within this state of foreign or other corporations, shall be allowed such commissions as may be fixed by the court appointing them, not exceeding five per cent on the amount received and disbursed by them. 5. In such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this act. When it is admitted by the pleading or examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court. Whenever, in the exercise of its authority, a court shall have ordered the deposit, delivery, or conveyance of money or other property, and the order is disobeyed, the court besides punishing the disobedience, as for contempt, may make an order, requiring the sheriff to take the money or property, and deposit, deliver, or convey it in conformity with the direction of the court. When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy." ¹

2. A receiver is a disinterested person, appointed by the

¹ Code, § 244.

court, to receive the rents, issues or profits of land, or other thing in question in the court, pending the suit, where it does not seem reasonable to the court that either party should do it.¹ He is an officer of the court which appoints him, and his possession is the possession of the court, and all moneys or other things that come into his hands are in the custody of the law for whoever can make out title to them.² But his appointment does not involve the determination of any right, or affect the title of either party in any manner whatever; not even so as to prevent the running of the statute of limitations.³ He is appointed on behalf of all the parties, and not of the plaintiff, or of one defendant alone. He represents all the parties interested in the action, and he is bound to act in all things with a view to the equitable interests of all such parties, and to follow such instructions as the court may give.⁴ In all cases of doubt or difficulty, he may apply to the court for instructions, and in many cases it is his duty to do so before acting.⁵

3. Being an officer of the court, any interference with, or resistance to his possession is a contempt of court;⁶ and if, in the discharge of his duty, he be threatened with violence, or actual violence be committed upon him, the court will attach the wrong doer.⁷ But a mere constructive interference will not be punished as a contempt.⁸

4. The appointment of a receiver rests within the sound

¹ *Chataque Bank, v. White*, 6 Barb., 297; *Wyatt's Prac. Reg.*, 355;

² *Lottimer v. Lord*, 4 E. D. Smith, 188; *Curtis v. Leavitt*, 1 Abb., 274; 10 How., 481; *Van Rensselaer v. Emery*, 9 How., 135; *Angell v. Silsbury*, 19 How., 48; *Delany v. Mansfield*, 1 Hogan, 234.

³ 1 Barb. Ch. Pr., 658.

⁴ *Davis v. Marlborough*, 2 Swandt, 125; *Porter v. Williams*, 9 N. Y. R., 142; 12 How., 107; *Gillett v. Moody*, 3 Comst., 479; *Curtis v. Leavitt*, 15

N. Y. R., 12, overruling; *Seymour v. Wilson*, 16 Barb., 294; *Haynor v. Fowler*, 16 Barb., 300.

⁵ *Curtiss v. Leavitt*, 1 Abb., 274; 10 How., 481; *Re Van Allen*, 37 Barb., 225.

⁶ *Wiswall v. Sampson*, 14 How. (U. S.), 65; *Noe v. Gibson*, 7 Paige, 513.

⁷ *Id.*; *Fitzpatrick v. Eyre*, 1 Malloy, 171.

⁸ *Albany R. R. v. Schermerhorn*, 10 Paige, 264.

discretion of the court, and should only be exercised when it is made to appear fit and reasonable that some indifferent person should be a receiver, for the greater safety of all the parties concerned.¹ A receiver should never be appointed merely because it can do no harm; nor, before judgment, unless there is a strong probability that the applicant will establish his right, and that the property will be lost, injured, or materially impaired in value for want of one.² Notwithstanding the discretion of the court in appointing a receiver, an appeal from an order making such appointment will always lie to the general term.³

5. A receiver should in general, be an entirely impartial and disinterested person, that he may perform his official duties without favor or prejudice. No one should be appointed, even at the wish of a majority, of the parties interested, whose interest strongly conflicts with the interests of the estate, and who has in any way taken an advantage for himself at the cost of the fund.⁴ He should be of sufficient ability and knowledge to manage the estate properly,⁵ and of unimpeached honor and integrity. If a person proposed has been engaged in any fraudulent or illegal transactions, the court will reject him.⁶ Other things being equal, the nominee of the party who conducts the reference or makes the application should be appointed.⁷ An attorney in the cause, cannot, for obvious reasons, be appointed receiver, but attorneys as such are not disqualified. The court may appoint any proper

¹ Verplank v. Caines, 1 John. Ch., 57; Hamilton v. Accessory Trans. Co., 3 Abb., 256.

² Hamilton v. Accessory Trans. Co., 3 Abb., 256; McCarthy v. Peake, 9 Abb., 164; People v. Mayor, etc., of N. Y., 19 How., 289.

³ Code, § 349; see contrary, Siney v. N. Y. Consolidated Stage Co., 28

Howard, 481; also, Sheldon v. Weeks, 2 Barb., 532.

⁴ Tripp v. Chard Railway, 11 Hare, 260.

⁵ Lupton v. Stephenson, 11 Irish Eq., 484.

⁶ Smith v. N. Y. Consolidated Stage Co., 28 How., 208.

⁷ Wilson v. Poe, 1 Hogan, 322.

attorney or counsellor as a receiver, provided he be not engaged in the action.¹ The next friend, or guardian *ad litem* of a party in the action is not a proper person to be appointed; nor is the son of such next friend or guardian.² So, it seems, the mortgagee of property could not be appointed.³ So, trustees of an estate will not, as a general rule, be appointed.⁴ When a corporation applies *voluntarily* for a dissolution, any of its officers or stockholders may be appointed receiver.⁵ But, where the dissolution is not voluntary, the officers of a corporation should not be made receivers of the effects.⁶ A party to the action may be appointed, but he cannot propose himself without leave of the court, nor is it customary to allow him any compensation for his services as receiver.⁷

6. Where several actions relating to the same property are brought by different parties, and a receiver has been appointed in one of them over the property in action, the person so appointed first, should be appointed receiver in all the other actions unless some good objection is shown against him.⁸ If he is not a suitable person, he may be removed, and one proper person appointed for all. Where the receiver in one suit is extended over other suits, he may be required to give additional security, if necessary, and may be removed for neglecting so to do.⁹

7. Either party to an action may apply for a receiver upon establishing an apparent right to property which is the subject of the action, and which is in the possession

¹ *Id.*; *Garland v. Garland*, 2 Ves., 137.

² *Edw. on Receivers*, 68.

³ *Id.*, 71.

⁴ *Id.*, 72.

⁵ 3 R. S. (5th ed.), 769; *Re Eagle Iron Works*, 8 Paige, 385; *Bowery Bank Case*, 5 Abb., 417.

⁶ *Attorney General v. Bank of Columbia*, 1 Paige, 517; see, however, *Bowery Bank Case*, 5 Abb., 415.

⁷ *McCarthy v. Peake*, 9 Abb., 168, note; *Fenn v. Bolles*, 7 Abb., 203; *Edw. on Receivers*, 73.

⁸ *Lottimer v. Lord*, 4 E. D. Smith, 183; *Cagger v. Howard*, 1 Barb. Ch. R., 368; *Osborne v. Heyer*, 2 Paige, 342.

⁹ *Lottimer v. Lord*, *supra*; *Cagger v. Howard*, *supra*.

of an adverse party, and that the property, or its rents and profits are in danger of being lost or materially injured or impaired.¹ The receiver of a bank, or insurance company, or corporation having power to make loans upon pledges or deposit, may be appointed on the application of the attorney general, or of any director, or of any stockholder.² Where a *limited* partnership is insolvent, and neglects to place its assets in the hands of a trustee for equal distribution among its creditors, such creditors may apply for a receiver. But all the creditors must join, or the plaintiff must sue for himself and all other creditors who will join. No single creditor can maintain the action in his own name.³ The same rule does not, however, extend to general partnerships.⁴ The receiver can only be appointed on the motion of an interested person. A stranger cannot make a nomination.⁵ But where the persons nominated by the party are rejected, the court may select a proper person.⁶

8. As a general rule, a receiver cannot be appointed until the action has been commenced.⁷ But, in extreme cases, it seems that a receiver of an infant's or lunatic's estate may be had even before the commencement of the action.⁸ So, where the defendant has fraudulently withdrawn or concealed himself, or designedly keeps out of the way to avoid the service of process, a receiver may be appointed before action is commenced. But in the latter case, the agent or attorney of the defendant, if he has any, should be notified of the motion for the appoint-

¹ § 244, *supra*.

² 3 R. S. (5th ed.), 764.

³ *Levy v. Ley*, 6 Abb., 89; *Lachaise v. Lord*, 1 Abb., 213; 4 E. D. Smith, 612.

⁴ *Crippen v. Hudson*, 18 N. Y. R., 161; see *contra*, *Dillon v. Horn*, 5 How., 35.

⁵ *Edw. on Receivers*, 22.

⁶ *Smith v. N. Y. Consolidated Stage Co.*, 28 How., 208.

⁷ *Kattenstroth v. Astor Bank*, 2 Duer, 632; *Anon.*, 1 Atk., 578; see *McCarthy v. Peake*, 9 Abb., 166; *Gibson v. Martin*, 8 Paige, 481.

⁸ *Ex parte Whitfield*, 2 Atk., 315; *Pitcher v. Hilliard*, 2 Dick., 580; *McCarthy v. Peake*, 9 Abb., 166.

ment.¹ Where the action is commenced by publication, the application for a receiver will not usually be entertained until the service is completed.² But where the property is of a perishable nature, or where irreparable injury may result from a delay, the receiver may be appointed at once, without waiting for the service of the process.³

9. By the ancient practice of the court of chancery, in England, a receiver was not appointed until after the coming in of the defendant's answer. But it is now well settled, both here and in England, that a receiver can be appointed before answer, provided the complainant can show that he has an equitable claim to the property in controversy, and that a receiver is necessary to preserve the same from loss.⁴

10. In ordinary cases, the motion for the appointment of a receiver should be made upon the usual notice of eight days, or, in a case of urgency, by an order to show cause.⁵ But, in special cases, a receiver may be appointed without notice to the defendant where irreparable injury to one or both parties would flow from delay, as where the defendant has left the state and cannot be served, and his solicitor declines to receive notice, and there are rents to be collected; ⁶ or where the defendant has fraudulently withdrawn himself from the state.⁷ In order to justify an appointment, *ex parte*, the circumstances must be peculiar and demand immediate action; and these facts should

¹ Quian v. Gunn, 1 Hogan, 75; 574; see West v. Swan, 3 Edw. Ch., Maguire v. Allen, 2 Ball & Bea., 75; 420; see Field v. Ripley, 20 How., Sandford v. Sinclair, 8 Paige, 374; 26.

3 Edw. Ch., 393.
² Sandford v. Sinclair, 8 Paige, 374; 3 Edw. Ch., 393.

³ People v. Norton, 1 Paige, 17; Tanfield v. Irvine, 2 Russ. Ch., 119; see McCarthy v. Peake, 9 Abb., 166; Sandford v. Sinclair, *supra*.

⁴ Bloodgood v. Clark, 4 Paige,

⁵ McCarthy v. Peake, 9 Abb., 166; Dorr v. Noxon, 5 How., 29; Kemp v. Harding, 4 How., 178; Gibson v. Martin, 8 Paige, 482.

⁶ People v. Norton, 1 Paige, 17.

⁷ Sandford v. Sinclair, 8 Paige, 374.

appear upon the papers on which the application is made.¹ In such cases, the receiver is only appointed for the protection of the property *pendente lite*, and the order will not assume to make a final disposition of the property without a hearing of the parties.² After judgment for default of an answer, a receiver may be appointed without notice.³ (See forms Nos. 112, 113).

11. Where a receiver has been appointed in one action, and a motion is made to extend such receivership to another action affecting the same property, it is not necessary to give notice to the plaintiffs in the first suit.⁴ But if the motion is for the appointment of *another* person as receiver of the same property, a notice should be given to the parties at whose instance the first receiver was appointed.⁵

12. A receiver may be appointed in an action although the complaint contains no prayer for one.⁶ But, where it is apparent at the commencement of the action, that a receiver may, by even a possibility, become necessary or proper, the better course would seem to be to demand a receiver pending suit.⁷ In Tillinghast & Sherman's Practice, however, this course is not commended, but it is there thought that under the Code the complaint should demand *final* relief only.⁸

13. The motion may be based on the complaint alone, if it be properly verified and contain the necessary allegations; but, in most cases, affidavits will be necessary, either in connection with the complaint or alone.⁹ Under

¹ People v. Norton, 1 Paige, 17; Gibson v. Martin, 8 Paige, 482.

² Kemp v. Harding, 4 How., 178; Dorr v. Noxon, 5 How., 29.

³ Austin v. Figueira, 7 Paige, 56; Nesmith v. Halsted, 11 Paige, 647.

⁴ Walsh v. Walsh, 11 Irish Eq. R., 607.

⁵ Lottimer v. Lord, 4 E. D. Smith, 188.

⁶ M'Craekan v. Ware, 3 Sandf., 688; Bowman v. Bell, 14 Sim., 392; see Edw. on Receivers, 21.

⁷ Edw. on Receivers, 22.

⁸ 1 Til. & Sher. Pr., 745.

⁹ 1 Til. & Sher. Pr., 745; 1 Whitt. P., 529; Edw. on Receivers, 77.

the former practice, where affidavits were used in connection with the complaint, such affidavits could not change or enlarge the case as made by the pleading.¹ A sworn petition may, also, be made the basis of an application, instead of affidavits.² So, the motion may be made on the defendant's answer where the admissions therein are of such a character as to justify such practice.³

14. In *mortgage cases*, the moving papers should show that some party to the action, or tenant under him, has possession, that the premises will not bring the amount of the mortgage debt on sale, and that the person who is personally liable for a deficiency is not able to meet such liability.⁴ In *partnership cases* the moving papers should show either that the firm has been dissolved, and that the partners cannot agree upon the settlement of its affairs, or a dissolution should be prayed for and facts alleged upon which the court will decree the same.⁵ And, in all cases, the moving papers should establish an apparent right to property which is the subject of the action, that such property is in the possession of an adverse party, and that the property, or its rents and profits, are in danger of being lost, or materially injured, or impaired.⁶ The facts and circumstances relied upon as the ground of the application, must be fully and positively set forth, mere conclusions, or statements upon information and belief, standing alone, will not, as a general rule, be sufficient.⁷

15. The application must, in all cases, be made to the *court*. Though we are not aware of any express decision to this effect, yet the entire absence of any authority,

¹ Hayes v. Heyer, 4 Sand. Ch., 485.

² See Sea Ins. Co. v. Stebbins, 8 Paige, 566.

³ Spratt v. Ahearne, Hayes & Jones, 800; Edw. on Receivers, 77.

⁴ Sea Ins. Co. v. Stebbins, 8 Paige, 566.

⁵ Garretson v. Weaver, 3 Edw.

Ch., 385; Jackson v. DeForest, 14 How., 83.

⁶ § 244, sub 1; see Goodyear v. Betts, 7 How., 187; People v. Mayor of N. Y., 10 Abb., 111; Smith v. Wells, 20 How., 158.

⁷ See Livingston v. Bank of N. Y., 26 Barb., 304; 5 Abb., 338.

statutory or judicial, for the allowance of a receiver by a judge out of court, and the unvarying course of practice, are conclusive on this point.¹

16. The court may exercise its power either by making the appointment directly, or by ordering a reference. Where the latter course is pursued, the court may direct the referee either to select and report a suitable person for such receiver, or to appoint such receiver himself, without further intervention of the court.² The latter course appears to be by far the most usual. Where it is referred to a referee to report a proper person to be appointed a receiver, an order of appointment by the court is necessary; but where the reference is to appoint a receiver and take the requisite security, the appointment by the referee needs no confirmation by the court, though any party interested may petition to have the appointment reviewed by the referee.³ An order of reference to appoint a receiver is proper in a partnership case;⁴ but not in proceeding supplementary to execution under section 298, according to the decision of Mr. Justice Hoffman in *Wood v. Lambert*.⁵ In that case, the learned judge held that the authority was conferred upon the judge and not upon the court, and that he could not delegate it. That he could, under section 300, order a reference to report evidence or facts, as to who was a proper person to be appointed, and the proper security, but that a reference to appoint, under that section, was void. (See forms Nos. 114 to 118, also No. 122).

17. The order of reference should be entered with the clerk, and a certified copy thereof served on the referee;⁶

¹ 1 Til. & Sher. Pr., 746; 3 R. S. (5th ed.), 764.

² *Matter of Eagle Works*, 8 Paige, 385; *Welter v. Schlieper*, 7 Abb., 92; *Jackson v. DeForrest*, 14 How., 82.

³ *Matter of Eagle Iron Works*, 8 Paige, 385.

⁴ *Welter v. Schlieper*, 7 Abb., 92.

⁵ Cited in *Hoff. Pro. Rem.*, 498.

⁶ 1 Barb. Ch. Pr., 670; *Edw. on Receivers*, 81.

copies should also be served upon all the parties interested; for such parties may have a right to appeal, and the time of such right will be limited only from the time of service of a copy, or a written notice of entry.¹ If such interested parties have appeared by attorneys the copies of the order may be served upon such attorneys, but otherwise the service should be personal.²

18. The moving party should obtain from the referee a summons, notifying the parties to attend. And if the personal attendance of the party against whose property the receiver is to be appointed, is required for the purpose of ascertaining what property is subject to the receivership, that fact should be stated in the summons or an underwriting, and the date and purport of the order should be introduced.³ Under the former practice such summons for the party to attend might be served on his solicitor, provided he had appeared by a solicitor;⁴ but I take it, that under the present practice the service should be personal, inasmuch as a disobedience of the summons brings a party into contempt.⁵ (See form, No.119).

19. Where a party has been summoned and does not attend, the referee may proceed, *ex parte*; and the proceedings will not be opened to review, unless a proper excuse be shown and the costs of the proceedings be paid.⁶

20. Where the parties have been duly summoned and the referee is ready to proceed, the moving party should lay before the referee, a written proposal containing the names and addresses of the intended receiver and his sureties, with an affidavit, stating the particulars of the property, over which the receivership is to extend, and

¹ Tyler v. Simmons, 6 Paige, 127; Holcomb v. Jackson, 2 Edw. Ch., 620; Edw. on Receivers, 82.

² Edw. on Receivers, 82; Tyler v. Simmons, *supra*.

³ Edw., on Receivers, 82; Holcomb v. Jackson, 2 Edw. Ch., 620.

⁴ Edw. on Receivers, 83, and cases.

⁵ See Code, § 418.

⁶ Rule 104 of the New York Chancery.

the value thereof so far as he is able to state it.¹ The opposing party, or any party interested, may present similar proposals, on his part, and may introduce counter affidavits or other evidence as to the actual value of the property, or to contradict any statement on the part of the moving party.² (See form No. 120).

21. It is the duty of the referee to appoint, or to report to the court, where the reference is for that purpose, the person whom he thinks the most fit, whether such person shall have been proposed by the one party or the other.³ But other things being equal, he should give the preference to the nominee of the party conducting the reference.⁴ Where none of the parties proposed are deemed proper, it seems that the court or referee may appoint some person of his own selection.⁵ A person not interested cannot propose a receiver ;⁶ nor can a party propose himself without first obtaining leave of the court.⁷ (See form of report, Nos. 121, 123).

22. Security will invariably be required of the person appointed receiver, to insure the faithful performance of his duties, and it will not be dispensed with even where all the interested parties consent.⁸ Where a reference is order, either to appoint, or to report to the court, it is the duty of the referee to fix the amount of security, and to approve the sureties.⁹ Where the reference is to *report* a proper person to be appointed receiver, and to approve of the sureties to be given by him, the referee is to fix the amount of security, and pass upon the sureties, and to report the same to the court. If the sureties are not satis-

¹ Edw. on Receivers, 87 ; 1 Whitt. Pr., 533.

² Id.

³ L'Espinasse v. Bell, 2 Jac. & Walk., 436.

⁴ Edw. on Receivers, 87 ; Wilson v. Poe, 1 Hogan, 322.

⁵ Smith v. N. Y. Consolidated Stage Co., 28 How., 208.

⁶ Att'y Gen. v. Day, 2 Madd., 246.

⁷ McCarthy v. Peake, 9 Abb., 168, note.

⁸ 1 Til. & Sher. Pr, 762, and cases.

⁹ Edw. on Receivers, 90.

factory to the referee, the party may present an amended proposal.¹

23. As has been before stated, the moving party should present with his proposal of the nominee and his sureties, an affidavit stating the particulars of the property over which the receivership is to extend, and the value of that property so far as he is able to state it, in order to guide the referee in fixing the amount of the security to be given. The referee may also examine the defendant, or other person, as a witness, to get at the amount of property and may compel the production of books and papers.² Upon a reference to appoint a receiver in a creditor's suit, the referee may require the defendant to answer under oath as to the property in his possession or control, and may examine witnesses to ascertain if there is any in the hands of a third person, to which the receiver is entitled. But the examination must be confined to the subject of property, and the defendant may refuse to answer any question bearing upon the merits of the action.³ After the assets have been delivered to the receiver, the usual examination upon the order to appoint a receiver should not, in general, be renewed.⁴

24. The usual course is to require two sureties;⁵ but *one* surety has been treated as sufficient in this state.⁶ The receiver is also to execute the undertaking or bond. The sureties of a receiver must be within the jurisdiction, and must be real and substantial persons, and capable of contracting; therefore infants, lunatics, idiots and married women, are inelegible.⁷ It is proper to allow the moving party to be one of the sureties for a receiver, if he is

¹ Edw. on Receivers, 89.

² Edw. on Receivers, 90.

³ Fitzhugh v. Everingham, 6 Paige, 29; Copous v. Kauffman, 8 Paige, 583; Gihon v. Albert, 7 Paige, 278.

⁴ Hudson v. Plets, 11 Paige, 180.

⁵ Edw. on Receivers, 89.

⁶ See Mechanics Ins. Co. case, 5 Abb., 446.

⁷ Edw. on Receivers, 93; 1 Barb. Ch. Pr., 673.

otherwise qualified, but the practice is not commended by Mr. Edwards, in his admirable work on Receivers, on the ground that it might tend to give such party an undue control over the acts of the receiver.¹ The security must be personal, and, therefore, the referee cannot take from the receiver an assignment of property, as a substitute for sureties.² Nor can a corporation be accepted as surety.³ If the sureties, or either of them, are rejected, a new surety, or sureties, must be proposed and approved.

25. When the referee has decided upon the person to be appointed receiver, and fixed the amount of security to be given, the prevailing party should prepare the proper undertaking. It is usually in the form of a penal bond conditioned, that the receiver shall, in conformity to the rules of the court, duly file his inventory, and annually or oftener, if required, account for what he shall receive or have in charge as receiver in the cause, and pay and apply what he shall receive or have in charge, as ordered by the court; and, in all respects, faithfully to discharge his duties as receiver. This bond when executed by the receiver and his sureties, must be duly proved or acknowledged in like manner as deeds of real estate, before the same can be received or filed, and the sureties should justify by an affidavit of justification annexed to the bond and to be filed therewith.⁴ But if this rule is not complied with, or is defectively complied with, the defect may be remedied by amendment.⁵ The approval of the referee should be indorsed on the bond. (See form No. 125).

26. The bond must be filed with the referee's report, and this should be attended to by the attorney for the prevailing party, since the receiver may be restrained

¹ See Edw. on Receivers, 94.

² Meade v. Orrery, 3 Atk., 235.

³ Manners v. Furge, 11 Beav., 30.

⁴ Sup. Court, Rule 6.

⁵ See Conklin v. Dutcher, 5 How.,

386; 1 Code R. (N. S.), 49.

from acting until it is filed.¹ But if the filing is omitted through inadvertence, the court may order it to be filed, *nunc pro tunc*.²

27. The referee having made the appointment, and taken the proper security, or having selected the proper person to be recommended to the court for appointment, and fixed the amount of security, according to the terms of the order of reference, reports the facts to the court. Where the order directs the referee to report a proper person to be appointed a receiver, and to approve of the sureties to be given by him, the appointment is not complete until the report is confirmed by the special order of the court.³ But where the referee is ordered to *appoint* a receiver, and to take from him the requisite security, no order of confirmation is necessary. The receiver is considered as appointed from the moment the bond taken by the referee, and the referee's report are filed, and may immediately enter upon the duties of his office.⁴ (See forms Nos. 121, 123, 124).

28. If either party is dissatisfied with the receiver appointed by the referee, he cannot except to the referee's report; his only recourse is to make a special application to the court for an order directing the referee to review his report.⁵ This application may be made either by petition or motion.⁶ Where made by petition, such petition should set forth all the grounds of objection, and contain a prayer that the referee review his report. Notice of the application must be served on all the parties interested.⁷

29. In order to support an objection to the referee's

¹ Mechanics Ins. Co. case, 5 Abb., 446; see Steele v. Sturges, id., 444.

² Whiteside v. Prendergast, 2 Barb. Ch. R., 471.

³ In re Eagle Iron Works, 8 Paige, 385.

⁴ Id.; Edw. on Receivers, 95.

⁵ In re Eagle Iron Works, 8 Paige, 385.

⁶ 1 Barb. Ch. Pr., 674.

⁷ Id.; Edw. on Receivers, 96.

appointment of a receiver, a strong case of disqualification is necessary.¹ In fact, it is a settled rule, in this state, that the court will not set aside the appointment, unless the person selected by the referee is legally disqualified, or his situation is such as to induce a belief that the interests of the parties will not be properly attended to by him.² The decision of the referee will not be disturbed merely because the court may think he could have made a better selection.³ If the court should order the referee to review his report, the parties will proceed by proposing a new person or persons, and issuing summons as before.⁴

¹Tharpe v. Tharpe, 12 Ves., 317.

³Id.

²In re Eagle Iron Works, 8 Paige, 385.

⁴Smith on Receivers, 11.

SECTION II.

GENERAL POWERS AND DUTIES OF.

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|--|---|
| 1. When the title vests in receiver. | 19. Not to pay out money without order. |
| 2. Does not effect liens on the property. | 20. Selling had debts. |
| 3. When bond is filed, title relates back. | 21. Purchases by, for the benefit of <i>cestui que trusts</i> . |
| 4. Receiver to take possession of the property, — may appoint agent. | 22. Should apply for leave to sue. |
| 5. Referee to order delivery. | 23. Application, on what based. |
| 6. What property vests in receiver. | 24. May sue in his own name. |
| 7. Concerning property without the state. | 25. Must show right of action in parties; and his appointment. |
| 8. Appointed for benefit of all interested. | 26. Vested with all the debtor's rights of action. |
| 9. When to apply to the court for instructions. | 27. Actions to set aside fraudulent transfer. |
| 10. Who may apply for instructions. | 28. Liability of persons interfering with the property. |
| 11. Notice of application should be given. | 29. Recovering costs from <i>cestui que trust</i> . |
| 12. What attorney receiver may employ. | 30. Maintaining actions outside the state. |
| 13. How and when to take possession of property. | 31. Not to defend actions without leave of the court. |
| 14. Court will protect possession of receiver. | 32. Actions against receivers. |
| 15. When receiver to account to prior lienholders. | 33. His duties in preserving property. |
| 16. Actions of ejectment by or against receiver. | 34. Filing inventory and accounting. |
| 17. May let premises and collect rents. | 35. Final accounting, and discharge. |
| 18. When may continue partnership business. | 36. Substituting one receiver for another. |
| | 37. Compensation of receivers. |

1. When the appointment of a receiver has been perfected by the filing of the report and security, the title to the personal property covered by the receivership vests in such receiver without any assignment or transfer from the prior possessor.¹ But not so the real property; that passes only by force of the debtor's own conveyance, which the court has power to compel him to execute.² Such was the undoubted rule under the former practice; but it

¹Porter v. Williams, 9 N. Y. R., 142; 12 How., 107; Moak v. Coats, N. Y. R., 369.
²Chautauque Bank v. Risley, 19 Barb., 498.

has been questioned since the Code. In *Porter v. Williams*,¹ Mr. Justice Willard thought that the Code had placed real property and personal property, with reference to this question, on the same footing, and that the appointment operated to transfer real as well as personal property, and Mr. Justice Harris, in *Edmonston v. McLoud*,² used language involving the same proposition. While the title of the receiver might perhaps be sufficient, by the bare appointment to enable him to impeach by action a fraudulent transfer, yet as to third parties and their rights, the title remains in the debtor until a conveyance. Whatever may be the effect of the appointment alone, it is well settled that the title to real property will pass by an assignment by the debtor to the receiver, made in pursuance of an order of the court. And an assignment of personal estate, though not strictly necessary, may frequently save trouble and can do no harm.

2. The appointment of a receiver does not operate in such a manner as to derange the priority of legal or equitable liens upon the property. As the object of the appointment of a receiver is to preserve the property for the person or persons entitled to it, the court will ultimately make such disposition of it as to preserve the legal as well as equitable rights of every claimant. Before the statute of 1845, the appointment of a receiver in a creditor's suit, was treated as an equitable sequestration of the property of the defendant. And even if the tenant of real estate was not a party to the bill, he could be made to attorn to the receiver, and pay the rents and profits to him. Much more could he be so required, when he was a party.³

3. Upon the receiver's giving the requisite security, his

¹ *Supra*.

² 16 N. Y. R., 548.

³ Wil. Eq. Jur., 334; citing Albany

City Bank v. Schermerhorn, 9 Paige, 372; see *Ins. Co. v. Stebbins*, 8 Paige, 565.

title to the *personal* estate of the debtor relates back to the date of his appointment; or where an order of reference to appoint has been made, to the date of such order; and where, between the date of the order and the filing of the security, the property has been levied upon by the sheriff, the court, on motion, will order a return of the property.¹

4. On appointing a receiver, the referee, or court, directs the defendant to deliver the property covered by the receivership to the receiver. If the possessor of the property, whether a party or not, refuse to give it up, the receiver must apply to the court for an order requiring him to surrender the same; and without such an order, he cannot justify a forcible taking of such property.² After the receiver has obtained the order, he must himself, personally, demand a delivery of the property; a demand by the plaintiff in the action, his attorney or the referee appointed to see the delivery made, will not warrant an attachment for disobeying the order to deliver.³ He may appoint an agent to assist him in managing the property, but it would be better to get the direction of the court to that effect.⁴

5. Where the defendant is directed to deliver over his property to the receiver, under the direction of a referee, it is customary for the receiver to call upon the referee to decide upon the examination of the defendant, and other evidence, if any is before him, what property, legally or equitably belonging to the defendant, and to which the receiver is entitled under the order of the court, is in the possession of the defendant or under his power and control. And it is the duty of the referee to direct the defendant to deliver over to the receiver the actual pos-

¹ Steele v. Sturges, 5 Abb., 442; Deming v. N. Y. Marble Co., 12 Abb., 66; Wilson v. Allen, 6 Barb., 542; Lotimer v. Lovel, 4 E. D. Smith, 183.

² Manning v. Monaghan, 1 Bosw., 465; Parker v. Browning, 8 Paige, 390.

³ Panton v. Zebbley, 19 How., 394.

⁴ ——— v. Lindsay, 15 Ves., 91.

session of all such property, in such manner and within such time as the referee may think reasonable. Where such direction is given, the defendant, if he is dissatisfied with the decision of the referee, can apply to the court to review the same; and he can, if the same be confirmed, be compelled, by process for contempt, to comply with that decision.¹ If the property is in possession of a third person, claiming a right to retain it, the receiver can proceed by suit against such person in the ordinary way, and thus try the right, or the plaintiff may amend his complaint, making such third person a party, and have the receivership extended to the property in his hands; so that the order for the delivery of the property may be binding upon him, and be enforced if necessary, by process of contempt.²

6. Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into the possession of a receiver; and hence the appointment of such a person has been said to be an equitable execution.³ A claim for a personal tort does not pass to the receiver, unless it has been reduced into a debt by judgment;⁴ but torts not personal pass even when such torts were committed before his appointment.⁵ In short, all legal and equitable claims that survive the person at common law, even though such claims are in litigation, vest in the receiver.⁶ But a mere possession upon sufferance, to which the defendant has no legal right, will not pass, nor can he be compelled to surrender it to the receiver.⁷

7. It was thought by Chancellor Walworth that a receivership covered property outside of the jurisdiction of

¹ Will. Eq. Jur., 335; *Parker v. Browning*, 8 Paige, 390.

² *Id.*

³ *Edw. on Receivers*, 6.

⁴ *Hudson v. Plets*, 11 Paige, 183.

⁵ *Gillet v. Fairchild*, 4 Denio, 80; *Brouwer v. Hill*, 1 Sandf., 629.

⁶ *Ten Broeck v. Sloo*, 2 Abb., 236.

⁷ *Gardner v. Smith*, 29 Barb., 76.

the court, provided the person of the defendant or owner of such property was within the jurisdiction, and that by the ordinary course of proceeding, the defendant may be compelled either to bring the property in dispute, or to which the plaintiff claims an equitable title, within the jurisdiction of the court, or to execute such a conveyance or transfer thereof as will be sufficient to vest the legal title, as well as the possession of the property, according to the *lex loci rei sitæ*.¹

8. As we have before seen, a receiver is the officer of the court, appointed for the benefit of all the parties interested in the property, and not merely for the benefit of the person at whose immediate instance that appointment takes place. He is therefore bound to act in all things with a view to the equitable interests of all the parties entitled, and to follow such directions as the court may from time to time give. It was formerly held, that in the ordinary cases, he had no powers except such as were conferred upon him by the order for his appointment and the course and practice of the court.² But since that decision, additional powers have been conferred on receivers by the statutes of 1845,³ and 1858.⁴

9. When the receiver is doubtful as to the nature and extent of his duties, he may apply to the court for instructions;⁵ and, in many cases it is his duty to do so before acting. Thus, before bringing ejectment, or leasing premises for more than one year, or selling bad debts, or seizing property held adversely, or paying out money, or commencing a suit, he should obtain the order of the court.⁶ The application for instructions should be made

¹ Mitchell v. Bunch, 2 Paige, 615; see Edw. on Receivers, 6; Abraham v. Plestoro, 3 Wend., 538.

² Verplanck v. Mercantile Ins. Co., 2 Paige, 452.

³ See Laws 1845, chap. 112.

⁴ Laws 1858, chap. 314.

⁵ Curtis v. Leavitt, 10 How., 481; 1 Abb., 274.

⁶ 1 Til. & Sher. Pr., 768; Edw. on Receivers, 113, et seq.

to the court which appointed him, and no other court ought to interfere with him in his official capacity.¹

10. The receiver himself usually applies to the court for its instruction, but a party to the suit may also apply; not so a stranger, unless it is necessary to protect his rights. A stranger is not authorized to apply to the court to secure him any advantage by means of the receivership, that he would not have been entitled to if no receiver had been appointed. But the court will give such directions, on the application of a stranger as are necessary to protect his rights.² The court will not direct the payment of debts due strangers, out of the fund, but if such debts are equitable claims on the fund, the court may allow actions to be brought thereon against the receiver.³

11. Where application is made to the court for instructions, notice of such application should be given to all interested parties, although an *ex parte* application will not be irregular.⁴

12. As a general rule the receiver cannot employ the attorney of either party, to aid him in the discharge of his duty.⁵ If he does, the proceedings may be set aside for irregularity, but the irregularity is so far waived by appearance without objection, that on a motion afterwards made to set aside the proceedings, the court will not do more than stay the proceedings until another attorney is substituted, and perhaps saddle the receiver with the costs of the motion.⁶ But the objection to employing such attorney extends only to such proceedings as are adverse to the interests of either party to the suit. There-

¹ Edwards v. Bostwick, cited 1 Til. & Sher. Pr., 769; Winfield v. Bacon, 24 Barb., 159.

² Vincent v. Parker, 7 Paige, 65; Howell v. Ripley, 10 Paige, 46; Walter of Ingraham, 2 Barb. Ch., 35.

³ Hubbard v. Guild, 2 Duer, 689.

⁴ Smith v. N. Y. Consolidated Stage Co., 28 How., 377.

⁵ Warran v. Sprague, 4 Edw. Ch., 416; Panton v. Zebley, 19 How., 394; Ryckman v. Parkins, 5 Paige, 543.

⁶ Id.

fore in any proceeding which is for the common interest of both parties, and not adverse to either, the receiver may employ the attorney of either party.¹ He may employ such attorney on application to the court for instructions.² But the better course is for the receiver in all cases to retain attorneys and counsel other than those engaged in the action. He should do this, even though he be a professional man himself, for if he himself act as counsel in the business, he will not be entitled to any extra counsel fees for his work.³ The rule that a receiver cannot employ the attorney of a party, is for the protection of the parties; and a stranger sued by the receiver cannot raise the objection.⁴

13. The receiver may take possession of the property covered by the receivership as soon as his appointment is completed, but it is not absolutely essential that he should do so, as, in the absence of fraud or collusion, mere delay in taking possession will not divest him of his title.⁵ Where there is no opposition to his possession, no order of the court is necessary; but if the possessor of the property, whether a party or stranger, refuses to deliver it up, the receiver must apply to the court for an order requiring him to do so; and without such order he cannot justify a forcible seizure of such property.⁶ On obtaining such order, the referee must himself make the demand of delivery, if he desires to have a disobedience of the order punished; a demand by the plaintiff in the action, or his attorney, will not warrant an attachment for refusing to deliver.⁷ Where a third party claims property already in

¹ *Bennett v. Chapin*, 3 Sandf., 675; *Ryckman v. Parkins*, 5 Paige, 543.

² *Smith v. N. Y. Consolidated Stage Co.*, 28 How., 377.

³ *Re Bank of Niagara*, 6 Paige, 213.

⁴ *Warren v. Sprague*, 11 Paige, 200; 3 N. Y. Leg. Obs., 122.

⁵ *Fessenden v. Woods*, 3 Bosw., 557.

⁶ *Manning v. Monaghan*, 1 Bosw., 465; *Parker v. Browning*, 8 Paige, 390.

⁷ *Panton v. Zebbley*, 19 How., 394.

the possession of the receiver, the proper course for such party is to apply to the court by petition for an order directing such receiver to surrender such property to the claimant; an attempt to obtain possession by force or suit against the receiver is a contempt.¹ Where the property is in possession of a third person, claiming a right to it, the receiver may proceed by suit against such person, and thus try the right, or the plaintiff may amend his complaint and make such person a party, and have the receivership extended to the property in his hands, so that he would be bound by an order for delivery of such property.²

14. The court will protect the legal and proper possession of its receiver against suits at law as well as violence, and will treat as a contempt any effort to deprive him of his rightful possession, either by force or suit, or by other proceedings, without the permission of the court which appointed him.³ Thus, a third party was held to be in contempt for distraining the property for rent.⁴ So, it is a contempt for a purchaser under a prior judgment against the debtor to attempt to divest the receiver's possession.⁵ So, if tenants of the defendant have attorned to the receiver, or agreed to account to him for his share of the crops, and the sheriff afterward levy upon them.⁶ But a mere formal levy by a sheriff, upon personal property held by a receiver, without interfering with the possession, is not contempt.⁷

15. Since the appointment of a receiver does not interfere with the priority of legal or equitable liens upon the property, therefore, when goods subject to prior liabilities

¹ *Riggs v. Whitney*, 15 Abb., 390; *Noe v. Gibson*, 7 Paige, 513; *Chautauque Co. Bank v. Risley*, 19 N. Y. R., 370.

² *Parker v. Browning*, 8 Paige, 390.

³ *Parker v. Browning*, 8 Paige, 399; *Noe v. Gibson*, 7 Paige, 513.

⁴ *Noe v. Gibson*, *supra*.

⁵ *Albany City Bank v. Schemerhorn*, 10 Paige, 263.

⁶ *Id.*

⁷ *Id.*

have come into the possession of a receiver, he is bound to account, under the directions of the court, for the proceeds to the proper party entitled to such priority. Thus, where the property taken by the receiver has been previously levied upon by the sheriff on execution issued upon judgments obtained prior to the appointment of such receiver, the receiver will be required to first pay the amount of such executions to the sheriff out of the property in his possession.¹

16. A receiver cannot bring an action of ejectment without leave of the court. Where leave is granted, the court will direct in whose name the suit shall be brought, and will direct the receiver to indemnify the person in whose name the suit is commenced out of the fund of the receivership.² Nor can an action of ejectment be brought against a receiver in possession without leave of the court. Such a course would amount to a contempt, for after a tenant has attorned to the receiver, the court is the landlord.³

17. Nor can a receiver let premises for a longer term than one year without the order of the court. He may let premises from year to year without a special order, but not longer.⁴ It is the duty of a receiver to collect the rents of the estate, and he should, immediately after his appointment, call upon the tenants to attorn to him. He should produce and serve upon such tenants certified copies of the order appointing him, and a certificate of the officer of the court that the referee's report has become absolute. If the tenants should refuse to attorn, the receiver should apply to the court for an order upon

¹ Becker v. Torrance, 31 N. Y. R., 631; Rich v. Loutrel, 18 How., 121; Re N. American Gutta Percha Co., 17 How., 549; see Field v. Ripley, 20 How., 26; see contra, Rutter v. Tallis, 5 Sandf., 610.

² Green v. Winter, 1 John. Ch., 60; in the Matter of Merritt, 5 Paige, 125; 16 Wend., 405.

³ Edw. on Receivers, 115.

⁴ Edw. on Receivers, 122.

them to attorn and pay the rent to the receiver in the cause, and any further refusal on their part may be treated as a contempt.¹ Where a receiver lets premises, he may give notice to quit, and such notice will be respected in a court of law.²

18. Where a receiver of a partnership business is appointed, he should ordinarily proceed and sell the establishment without delay, but, in the mean time, the business should be carried on by him as usual, so that the good will thereof may be secured to the purchaser and the full value of the establishment realized by the partners on such sale.³ Such is no doubt the rule when the good will would become valueless or seriously depreciated by a stoppage of the business, or where the property is of such a kind as would be at great expense and suffer injury by not being used; as the horses of a livery stable.⁴ But in other cases the court should not, generally authorize the receiver of partnership property to carry on the business in the use of the firm property until a sale can be made.⁵ The receiver of a firm whose business is to publish a newspaper, may be empowered to carry on such paper until it can be advantageously disposed of.⁶ So, underlike circumstances, the defendant may continue to edit a paper under the direction of a receiver.⁷

19. A receiver should not, except, perhaps, in very special cases, pay out money of the estate without the order of the court.⁸ Where he pays out money in pursuance of an order, he must act strictly within its legal limits, and not upon any equitable views of a claim submitted to him.⁹ Nor should a receiver lay out the money

¹ Edw. on Receivers, 128.

² Doe v. Read, 12 East., 58.

³ Marten v. Van Schaick, 4 Paige, 480.

⁴ Jackson v. DeForest, 14 How., 81. 19 How., 84.

⁵ Id.

⁶ Dayton v. Wilkes, 17 How., 510.

⁷ Marten v. Van Schaick, *supra*.

⁸ See Edw. on Receivers, 121.

⁹ See Brown v. N. Y. & Erie R. R.,

in repairing, much less in improving, the premises of which he has charge, without first obtaining leave of the court so to do.¹

20. Although a receiver may have power, under his general authority, to sell bad debts, yet it would be advisable to apply for leave to sell. Where the receiver is appointed in a creditor's suit, leave of the court to sell desperate debts is expressly required by rule 92.² (See forms Nos. 128, 129).

21. A receiver, like any other fiduciary, cannot himself buy at a sale made by him. Any purchase, if made by him, will enure to the benefit of the *cestui que trusts* at their election.³

22. Where a receiver desires to bring a suit in relation to the trust estate, he should apply to the court for leave.⁴ Should he bring the action without such leave, he acts at his peril, and, if unsuccessful, will be charged with costs.⁵ Thus, where a receiver had prosecuted an action as such receiver, without leave of the court, and had failed in his action, on motion for costs against him personally, the motion was granted.⁶ A receiver should apply for an order to prosecute for debts, etc.⁷ Having obtained such leave he is bound to sue.⁸ But, of course, the claim to be prosecuted will not be altered or strengthened by reason of such leave.⁹ Where it is necessary that the action be brought in the name of some person other than the receiver, such person must have notice of the application for leave to sue;¹⁰ and if the leave be granted, the court

¹ Blunt v. Clitherow, 6 Vesey, Jr., 801; Waters v. Taylor, 15 Vesey, Jr., 25.

² Edw. on Receivers, 152.

³ Jewett v. Miller, 6 Seld., 402.

⁴ Smith v. Woodruff, 6 Abb., 65; Phelps v. Cole, 3 Code R., 157.

⁵ Id.

⁶ Id.; see, however, Marsh v. Hussey, 4 Bosw., 614.

⁷ Id.; Merritt v. Lyon, 16 Wend., 410.

⁸ Winfield v. Bacon, 24 Barb., 154.

⁹ Williams v. Lakey, 15 How., 206.

¹⁰ Merritt v. Lyon, per Cowan, supra.

will direct the receiver to indemnify such person out of the trust fund.¹ (See forms Nos. 126, 127).

23. The application for leave to sue should be based upon a petition or affidavit specifying the particular debts, or claims, on which the action is sought to be commenced, the probability of recovering the same; that he has made diligent inquiry concerning the pecuniary circumstances of the debtors, and that, from such inquiry, he believes such debtors to be solvent and able to pay.²

24. With the exception of actions for ejectment, receivers may sue in their own names. By the act of April 24, 1845, it is provided that, "Receivers and committees of lunatics and habitual drunkards, appointed by any order or decree of the court of chancery, may sue in their own names for any debt, claim or demand transferred to them, or to the possession and control of which they are entitled as such receiver or committee."³ In actions for ejectment it seems the former rule must prevail.⁴

25. But a receiver, in general, is not clothed with any right to maintain an action which the parties or the estate which he represents, could not maintain. He must show a cause of action existing in those parties, and that, by the appointment of the court, lawfully made, in a matter where the court had jurisdiction, the power has been conferred on him in his representative capacity as receiver to prosecute the action.⁵ One suing as receiver, should at least state the place of his appointment, and distinctly aver that he has been appointed by an order of the court. Merely alleging that he was duly appointed on such a day is not sufficient.⁶

26. A receiver, as such, is vested with all the rights of

¹ *Green v. Winter*, 1 John. Ch., 60.

² *Edw. on Receivers*, 136.

³ *Laws of 1845*, chap. 112.

⁴ See 2 R. S., 303, § 3.

⁵ *Coope v. Bowles*, 28 How., 10.

⁶ *Gillett v. Fairchilds*, 4 Denio, 80;
White v. Low, 7 Barb., 204.

action which the individual or company, of which he is receiver, had when he was appointed, and he can sue for torts committed before his appointment.¹ He can also sue the debtor himself, for a conversion of the trust property after his appointment.²

27. So, the receiver has an unquestionable right to bring an action in his own name to set aside a fraudulent transfer of the property.³ Such power has for a long time been acknowledged by the courts, and is also expressly given by statute.⁴ By the act of 1858, it is provided, "That any executor, administrator, receiver, assignee, or other trustee of an estate, or the property and effects of an insolvent estate, corporation, association, partnership, or individual, may, for the benefit of creditors or others interested in the estate or property, so held in trust, disaffirm, treat as void, and resist all acts done, transfers and agreements made, in fraud of the rights of any creditor including themselves, and others interested in any estate or property held by, or of right belonging to any such trustee or estate."⁵

• 28. "That every person who shall, in fraud of the rights of creditors and others, have received, taken, or in any manner interfere with the estate, property or effects of any deceased person, or insolvent corporation, association, partnership or individual, shall be liable in the proper action to the executors, administrators, receivers or other trustees of such estate or property for the same, or the value of any property or effects so received or taken, and for all damages caused by such acts to any such trust estate."⁶

29. "That any indorser or other surety, and any as-

¹ Brouwer v. Hill, 1 Sandf., 629.

² Gardner v. Smith, 29 Barb., 68.

³ Porter v. Williams, 5 Seld., 142;
12 How., 107.

⁴ Laws 1858, chap. 314.

⁵ Id., § 1.

⁶ Id., § 2.

signee, executor, or administrator, or other trustee shall be entitled to and allowed to recover from his principal or *cestui que trust*, all necessary and reasonable costs and expenses paid or incurred by him in good faith as such surety or trustee in the prosecution or defense in good faith of any action by or against any assignee, executor, administrator or other trustee as such.¹

30. Whether a receiver can maintain an action outside of the jurisdiction within which he was appointed, has given rise to a conflict, or an apparent conflict, of decisions. The United States court holds that he cannot;² while the state court holds the reverse.³ In Tillinghast & Sherman's Practice, an attempt is made to reconcile the two decisions by interpreting the first, as follows: "An ordinary receiver cannot maintain an action out of the state in which he was appointed." And the second: "But a statutory receiver, having the powers of a general assignee, will be allowed in comity to do so."⁴

31. A receiver should not defend an action without leave of the court. He has no right to do any act which may involve the estate in expense without first applying to the court, and the defense of an action is clearly improper without leave, since the action may be of such a character as to be enjoined by the court on a proper application. If he defends without leave he does so at his peril, and is liable for costs.⁵

32. An action cannot be commenced against a receiver without leave of the court appointing him.⁶ If such action is brought without leave, it will be a contempt, and the receiver may have an order restraining the action.⁷

¹ Id., § 3.

² Booth v. Clark, 17 How. (U. S.), 322.

³ Runk v. St. John, 29 Barb., 585; see Hoyt v. Thompson, 1 Seld., 320.

⁴ See 1 Til. & Sher. Pr., 770.

⁵ Swaby v. Dickon, 5 Simons, 629.

⁶ Hubbell v. Dana, 9 How., 424; DeGroot v. Jay, 30 Barb., 483; 18 How., 121.

⁷ DeGroot v. Jay, supra.

But the omission to obtain leave to sue does not in any way affect the legal rights of the party, or the validity of the proceedings in the suit, but is purely a question of contempt.¹ The irregularity may also be waived by a general appearance in the action without objection; and it seems that leave to sue a receiver is usually granted of course; and, if necessary, can be granted at any stage of the action.²

33. The receiver should keep the exclusive control of the trust fund, otherwise he will be liable, if loss ensue.³ It is also his duty to keep the trust moneys entirely separate and distinct from his own money. If deposited in a bank, the money should be deposited to a separate account, in his name as receiver, to the end that the fund may be at all times identified and traced. If he mixes the trust moneys with his own, and uses them indiscriminately, he will be charged with interest, although he make no profit from such use.⁴ So, if a receiver loan out such moneys to his friends or others, even temporarily, it is a breach of trust. Nor is the receiver allowed to make any profit out of the funds, and if he employ them in trade he will be charged with the whole profit.⁵

34. It would be well in all important cases, for the order appointing a receiver, to contain a direction that the receiver file an inventory, and render an account annually under oath. However, I understand it to be the duty of the receiver to make such inventory and render such account, whether the order so direct or not. By the 469th section of the Code, it is provided, that, "The present rules and practice of the courts in civil actions, inconsistent with this act, are abrogated, but where consistent with

¹ *Chautauque County Bank v. Risley*, 19 N. Y. R., 369.

² *Hubbell v. Dana*, 9 How., 424.

³ *Edw. on Receivers*, 573.

⁴ *Utica Ins. Co. v. Lynch*, 11 Paige, 520.

⁵ *Id.*

this act, they shall continue in force, subject to the power of the respective courts to relax, modify, or alter the same.”¹ This section, it may be presumed, saves the old equity rules and practice where ever they may be found consistent with the Code.² Among the rules of chancery, not inconsistent with the Code, or relaxed, modified or altered by the supreme court rules, is the following: “Every general guardian, receiver or committee appointed by this court, shall, within six months after his appointment, and every special guardian for the sale of an infant’s estate, shall, within six months after the order confirming the sale of the estate or any part thereof, file in the office where the appointment is entered, a just and true inventory, under oath, of the whole real and personal estate committed to his care or guardianship, and of the manner in which any funds under his care or control, belonging to the estate are invested; stating the income and profits of the funds or estate and the debts, credits and effects, so far as the same have come to his knowledge. And he shall annually thereafter, so long as any part of the estate or of the income or proceeds thereof, remains in his hands or under his care or control, file in the same office an inventory and account, under oath, of his guardianship, or trust, and of any other property or effects belonging to the estate which he has since discovered, and of the amount remaining in his hands or invested by him, and of the manner in which the same is secured or invested; stating the balance due from or to him at the time of rendering his last account, and his receipts and expenditures since that time, in the form of debtor and creditor.”³ The receiver cannot be compelled to account and show his books

¹ See Rule, Supreme Court, 93.

³ Chancery Rule, 154.

² *Allen v. Smillie*, 1 Abb., 357;
see *Edw. on Receivers*, 610.

to a party to the suit. He is an officer of the court and is to account to the court only.¹

35. When the duties of the receiver are at an end, whether by the termination of the suit, or by other means, he should petition the court to be allowed to account and be discharged, and to have the undertaking of himself and sureties annulled.² The mere discontinuance of the suit does not discharge a receiver appointed therein. But it will entitle him to apply for his discharge and to have his account passed, and his sureties discharged from further liability.³ The receiver, in a judgment creditor's suit, will not be discharged without a special order obtained upon a written consent of all the parties interested in the property in his hands, or on due notice of the application.⁴ (See forms Nos. 130, 131, 132).

36. The court may, for good cause shown, discharge a receiver, on his own application, before the completion of his duties, and appoint another in his stead.⁵ But there must be strong grounds for such a course, or the application will be denied; especially is this so, where his discharge and the appointment of another in his place will inconvenience parties in interest, and third parties.⁶ In a case cited by Mr. Edwards, as having occurred in his own practice, the receiver wanted to go to Europe on his own affairs, to be absent a year, and the chancellor, on a petition, allowed him to pass his accounts, be discharged, have his recognizance vacated, and a new receiver appointed, and gave him the costs of being discharged.⁷

37. The receiver is the officer of the court, and in the absence of any positive legislation on the subject, the

¹ Musgrove v. Nash, 3 Edw., 172.

² See Edw. on Receivers, 627.

³ Whiteside v. Pendergast, 2 Barb., Ch., 471.

⁴ Edw. on Receivers, 667; citing Chancery Rule, 193.

⁵ Edw. on Receivers, 660.

⁶ Beers v. Chelsea Bank, 4 Edw. Ch. R., 278.

⁷ Purdy v. Rapelye, cited in Edw. on Receivers, 661.

court has authority to determine his compensation.¹ The general mode of compensating, is by a commission on the receipts and disbursements. A *per diem* compensation will not be allowed. The commissions are intended to be a full compensation for his services, and if he acts as counsel in the business of the receivership, he is not entitled to special remuneration beyond the taxable fees as counsel.² Where the account of a receiver is made up, without a direction from the court to make periodical rests therein, his commissions for receiving and paying out must be computed upon the aggregate amounts of his receipts and expenditures for the whole time of accounting. If the receiver renders annual accounts in conformity with the usual practice, and the rules of the court, he may charge his commission of the receipts and disbursements of the previous year, exclusive of such sums as have been received for interest and reinvested.³ A receiver is not to be allowed full commissions, both on the receipts and disbursements.⁴ The proper rule is, to allow him one-half of the commissions upon all moneys received by him, as such receiver, other than as principal moneys received from investments, made by him, on account of the trust estate. And he is also to be allowed his half commissions on all moneys invested or reinvested by him in bonds and mortgage, or other securities, for the benefit of the trust estate, leaving the residue of the half commission upon the funds which remain invested, or unexpended, at the time of passing the account for future adjustment, when such funds shall have been expended, or on the final accounting.⁵ The receiver is usually allowed the same compensation as is allowed by law to executors.⁶ That is,

¹ Edw. on Receivers, 642.

² Re Bank of Niagara, 6 Paige, 213.

³ Id.

⁴ Id.; Howes v. Davis, 4 Abb., 71.

⁵ Re Kellogg, 7 Paige, 266; re Roberts, 3 John. Ch., 43.

⁶ Howes v. Davis, 4 Abb., 71.

for receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five per cent; exceeding one thousand, and not amounting to ten thousand, two and a half per cent; for all sums above ten thousand dollars, one per cent.¹

¹ 3 R. S. (5th ed.), 179; § 64; as am'd 1863, chap. 362, § 8.

SECTION III.

IN WHAT CASES APPOINTED.

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| <ol style="list-style-type: none"> 1. Receivers under subdivision 1, § 244. 2. Not allowable in actions on contract for recovery of money only. 3. In actions to dissolve partnerships. 4. When mere dissatisfaction or a quarrel will not justify. 5. Where dissolution has taken place—must be breach of duty. 6. Where partner applying has possession of the property. 7. Continuing partnership business under receiver. 8. Receiver to sell property and collect debts. 9. Existence of partnership must be proved; where one partner is insolvent. 10. In actions between representatives of deceased partner, and the surviving partner. | <ol style="list-style-type: none"> 11. Of limited partnerships. 12. In cases of executors and administrators. 13. Trustees. 14. In foreclosure suits. 15. Not appointed against a mortgagee in possession. 16. In action to recover possession of real estate. 17. In actions for partition, or construction of will. 18. In an action for specific performance. 19. Between joint tenants and tenants in common. 20. Pending appointment of committee for lunatic. 21. Of an infant's estate. 22. To enforce payment of charges on lands. 23. In actions for divorce. |
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1. The first subdivision of the foregoing section provides, that "A receiver may be appointed; 1st, before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost or materially injured or impaired; except in cases where judgment upon failure to answer may be had without application to the court."

2. It will be observed that a receiver is not proper, before judgment, in cases where judgment upon failure to answer may be had without application to the court, that is, in actions arising on contract for the recovery of money only; and it is said not to be allowable in actions for

mere damages, although the above exception does not, in terms, include such cases.¹ An analysis of the different clauses of the above section will be found elsewhere, and it is unnecessary to repeat it here.²

3. Upon a bill filed by one of the partners to close up a partnership concern, it is a matter of course to appoint a receiver, if the parties cannot agree among themselves as to the disposition and control of the property.³ So it is, where either partner has a right to dissolve the partnership, and the articles of copartnership do not provide for the settlement of the concern.⁴ So, a receiver will be appointed on the application of a partner who alleges that the firm is insolvent, and that his copartners are wasting the assets.⁵

4. But the mere dissatisfaction of one partner will not justify him in filing a bill for a dissolution, when, by their express agreement, it is to continue for a definite time. If there is any breach of the covenants by one partner, which, in its consequences, would be so important as to authorize the party complaining to call for a dissolution before the copartnership can be dissolved by the efflux of time, the complainant may have a receiver. But to induce the court to interfere, there must be some actual abuse of the partnership property or the rights of a copartner, and not a mere temptation to such abuse;⁶ nor will a receiver be appointed merely because the partners quarrel, as that may not of itself be a sufficient ground for severing the connection between them.⁷

5. But where a dissolution has already taken place, or it is apparent that it will be decreed, on the ground of

¹ Whit. Pr., 530.

² See ante, section 1.

³ Marten v. Van Schaick, 4 Paige, 479.

⁴ Law v. Ford, 2 Paige, 310; Jackson v. De Forest, 14 How., 81.

⁵ Williams v. Wilson, 1 Bland., 423.

⁶ Henn v. Walsh, 2 Edw. Ch., 129.

⁷ Id.

some breach of duty or contract by one of the partners, a receiver will be appointed.¹ The simple fact, however, that a partnership has been dissolved will not authorize a receiver. There must be some breach of duty of a partner, or of the contract of partnership.² A receiver will be appointed when a partner has been carrying on trade on his own account with the copartnership effects;³ or where a partner neglects the business and receives money from the customers without accounting;⁴ or where any one partner attempts to exclude another partner from that share in the management of the firm which he is entitled to, either during the continuance of the firm, or during the winding up of the affairs after the determination of the partnership;⁵ or where one partner unjustly takes possession of the property, and refuses to give the other partner security, or access to the books.⁶

6. But a receiver will not be appointed where the partner applying has the property in his own possession. He can, as such partner, sell it, and the only liability which attaches to him is that of accounting to the other partner for his share of the property, and if the latter does not object, he who has the possession ought not to complain.⁷ And where the articles of dissolution intrust the charge of the property, and the winding up of the concern, to one of the partners, the court will not interfere with his proceedings, except upon proof of a palpable breach of the articles, or of some misconduct amounting to fraud or endangering the property.⁸

7. The principle upon which a receiver of partnership property is appointed is with the view of winding up and

¹ Id.

² *Harding v. Glover*, 18 Ves., 281.

³ Id.

⁴ *Read v. Bowers*, 4 Brown's Cases in Ch., 441; see also *Goodman v. Whitcomb*, 1 Jac. & W., 573.

⁵ *Wilson v. Greenwood*, 1 Swanst.,

481; *Const v. Harris*, 1 Turn. & Russ., 496.

⁶ *Roberts v. Eberhardt*, 23 En. L. & Eq. Rep., 245.

⁷ *Smith v. Lowe*, 1 Edw., 33.

⁸ *Walker v. Trott*, 4 Edw., 38.

disposing of the concerns of the partnership, and dividing the surplus, and not for the purpose of carrying on the business. Hence, as a general rule, a receiver will not be appointed of a subsisting and continuing partnership, except in cases where the plaintiff will clearly be entitled to a decree of dissolution.¹ Nor will the court authorize the receiver to continue the business of a partnership even until the sale can be made, except in those cases where the good will of the business is valuable and would be injured or seriously depreciated by a stoppage of such business, or where the property is of such a kind as would be at great expense, and suffer injury by not being used.² Where the partnership effects consisted of a printing establishment and the subscription list and advertising custom of a public newspaper, the court ordered the receiver to proceed and sell the establishment without delay; and, that in the meantime, the business be carried on by him, as usual, so that the good will of the firm might be secured to the purchaser, and the full value of the establishment realized by the partners, on such sale.³ So, where a bill was filed to determine the rights of part owners of a vessel, and for an accounting, the vessel was run for two seasons under the direction of the receiver, but the court holding that it was unseemly and unfit that such operations should be conducted under the direction of the court for so long a time, ordered the vessel to be sold.⁴

8. After the receiver is appointed, he should proceed to sell the partnership property and collect in the outstanding debts without delay;⁵ and under the order of the court, to appropriate the proceeds to the payment of all

¹ Jackson v. DeForest, 14 How., 479; Dayton v. Wilkes, 17 How., 81; Garretson v. Weaver, 3 Edw., 510.
385.

⁴ Crane v. Ford, Hopkins, 114.

² Jackson v. DeForest, 14 How., 81.

⁵ Jackson v. De Forest 14 How., 81.
³ Marten v. Van Schaick, 4 Paige, 81.

the debts of the firm rateably without giving any preference to the favorite creditors of either partner.¹

9. The existence of the partnership must be admitted or established before a receiver can be appointed.² Where the dissolution is on the ground of the insolvency of some of the partners, although the solvent partner has no better claim, as a matter of right, to the receivership than the other partners, he should, nevertheless, have the preference, when his capacity and integrity are unquestioned.³

10. The same rules which prevail respecting the appointment of a receiver in a suit between partners, are applicable in a suit between the representatives of a deceased partner and the surviving partner.⁴ But upon the dissolution of a copartnership by the death of one of the copartners, the survivor is entitled to close up the affairs of the firm, and he will not be deprived of that right by the appointment of a receiver, if he is responsible and acts in good faith.⁵

11. Whenever a limited partnership is insolvent within the meaning of the statute, (1 R. S., 766, § 20), any creditor at large is entitled to have its affairs wound up and its assets distributed *pro rata* among those of its creditors who have not obtained a specific lien.⁶ But it is essential, however, before taking away the control of the assets of a limited partnership from members of the firm on the ground of insolvency, to ascertain whether all who have an interest in their retention of such control are before the court.⁷ In an action by the survivors of special partners,

¹ Law v. Ford, 2 Paige, 310.

² Goulding v. Bain, 4 Sandf., 716.

³ Hubbard v. Guild, 1 Duer, 662; see also Jacquin v. Buisson, 11 How., 385.

⁴ Collyer on Part., 197.

⁵ Evans v. Evans, 9 Paige, 178; Dyer v. Clark, 5 Metcalf, 562.

⁶ Walkenshaw v. Perzel, 32 How., 233; Jackson v. Sheldon, 9 Abb., 134; Levy v. Ley, 6 Abb., 89; Whiteright v. Stimpson, 2 Barh., 379.

⁷ Walkenshaw v. Perzel, 32 How., 233.

and all others who may come in, against the general partners, to wind up the partnership on the ground of insolvency, and for a receiver, the executors of the deceased special partner should be made parties, and as they may represent conflicting interests of the testator as to carrying on the partnership business or destroying it, and enforcing the claims of the testator for advances, they should be made defendants.¹

12. Where an executor or administrator has been guilty of fraud, misconduct, or negligence, in the management of the trust estate, or has become bankrupt, a receiver may be appointed. But there must be, especially in the case of an executor, strong grounds to induce the court to interfere. So, a receiver may be appointed where there are strong reasons to expect insolvency and danger to the fund.² A receiver may be appointed in the discretion of the court in all cases where executors have become bankrupt, or wasted or misapplied the assets, or where any part thereof has been lost through their misconduct or negligence.³ Where a bill charged an executor with abuse of trust a receiver was appointed.⁴ But the simple fact that an executor is poor is no ground for the appointment of a receiver; there must be proof of the unfitness of the person.⁵ Nor will the court interfere on the ground that the executor is an old man, if he be in the full possession of his faculties.⁶ A receiver was appointed in England, where the executor was a bankrupt, even at the death of the testator, but it was granted on the ground that it did not clearly appear that the testator knew of it.⁷ And in a later case a receiver was appointed even where the bank-

¹ Walkenshaw v. Perzel, 32 How., 233.

² Middleton v. Doddsell, 13 Ves., 266; Jenkins v. Jenkins, 1 Paige, 243.

³ Jenkins v. Jenkins, 1 Paige, 243.

⁴ Boyd v. Murray, 3 John. Ch., 48.

⁵ Howard v. Papera, 1 Mad. Ch., 142; Anon. 12 Ves., Jr., 4.

⁶ Hosack v. Rogers, 6 Paige, 415.

⁷ Gladdon v. Stoneman, 1 Madd., 142, note a.

ruptcy of the executor was known to the testator after he made his will.¹ A surviving executor and trustee has a right to the exclusive possession of the property of the estate. If he be insolvent, or his circumstances are otherwise such as to render the trust fund insecure, the remedy and relief are to be obtained by the *cestui que trust* or some person interested in the estate of the deceased.² The powers formerly exercised by the chancellor over executors have been conferred substantially to the same extent upon surrogates.³

13. A party clothed with the character of a trustee may be interfered with and a receiver appointed over him, upon the same grounds as will induce the court to act in the case of an executor.⁴ But to justify such interference there must be some evil actually existing, or some evidence of danger to the property, or a strong special case of fraud in the defendant clearly proved.⁵ It is not a sufficient ground to authorize a receiver that a trustee mixes the trust fund with his own.⁶ But a general breach of trust endangering the fund, will justify the appointment.⁷ Thus where the officers of an insurance company had suffered its funds to be wasted, and one of them had absconded with a part thereof, a receiver was appointed in an action brought by one of the insured on behalf of himself and all others interested.⁸ So, where a state employed an agent to sell its bonds at par for cash, and he sold them below par, on credit, a receiver was appointed, and the agent was ordered to transfer to him such bonds as remained in his hands with the proceeds of such as

¹ Langley v. Hawk, 5 Madd., 46.

² Shook v. Shook, 19 Barb., 653.

³ 3 R. S. (5th ed.), 156; see Emerson v. Bowers, 14 Barb., 658; Cotterell v. Brock, 1 Brad. Sur., 148.

⁴ Wilson v. Wilson, 2 Keen., 249.

⁵ Willis v. Corliss, 2 Edw., 281;

Orphan Asylum v. M'Cartee, Hopk., 429.

⁶ Orphan Asylum v. M'Cartee, supra.

⁷ Evans v. Coventry, 5 De Gex. M. & G., 918.

⁸ Id.

had been sold.¹ In an action for the removal of a trustee on the ground of his unfitness, the court may, in its discretion appoint a receiver pending the suit.² So it may where the trustee is insolvent or otherwise unworthy of confidence.³ So, where a trust has devolved upon the court, the parties interested may apply for a receiver to act until a new trustee be appointed.⁴

14. The plaintiff in a foreclosure suit is entitled to a receiver of the rents and profits of the mortgaged premises pending the suit where such premises will not, upon a sale thereof under the decree, bring sufficient to pay the debt and costs, and when the party who is personally liable for the mortgaged debt is irresponsible. But the appointment will be dispensed with if the defendant, who is in possession of the mortgaged premises, gives security to account for the rents and profits as the court shall direct in case there should be a deficiency upon the sale of the premises under a decree.⁵ Receivers in mortgage cases are allowed with great caution, and will be appointed only where there is a clear inadequacy of security, or the rents have been expressly pledged for the debt.⁶ The mortgage debt must be wholly due, unless the mortgagee has taken a pledge of the rents and profits of the whole premises to keep down the accruing interest in the meantime.⁷ In a petition for the appointment of a receiver in a foreclosure suit, the complainant must state that the premises are not of sufficient value to satisfy his debt and costs, and that the mortgagor or other person who is personally liable for the payment of the mortgage debt is irresponsible, or is unable to pay the expected deficiency.

¹ *State of Illinois v. Delafield*, 8 Paige, 527; 2 Hill, 159.

² *Juneway v. Green*, 16 Abb., 215, note.

³ *Haggarty v. Pittman*, 1 Paige, 298; *Boyd v. Murray*, 3 John. Ch., 48.

⁴ *McCosker v. Brady*, 1 Barb. Ch., 329; 1 N. Y. R., 214.

⁵ *Sea Ins. Co. v. Stebbins*, 8 Paige, 565.

⁶ *Shotwell v. Smith*, 3 Edw., 588.

⁷ *Bank of Ogdensburgh v. Arnold*, 5 Paige, 38.

He must also show who is in possession of the mortgaged premises, as a receiver can only be appointed when the person in possession of the premises, by himself or his tenant, is a party to the suit. Where the defendant in such foreclosure suit is in possession of the mortgaged premises by his tenant, who is not a party, the possession of the tenant cannot be disturbed by the appointment of a receiver, but he may be ordered to attorn to the receiver and to pay rent to him.¹

15. A receiver will not be appointed against a mortgagee in possession, so long as he will swear there is a balance due him, and the fact whether such balance is due, cannot be tried by the court on affidavits.² Nor will a receiver be appointed pending a bill to redeem unless the complainant is insolvent.³ So, a receiver of chattel property held by a mortgagee in possession, will not be appointed, except in case of pressing necessity to secure the rights of other parties.⁴

16. A receiver cannot be appointed in an action to recover the possession of real estate, unless some equitable grounds are made to appear, entitling the plaintiff to the rents and profits as such, or unless their sequestration is necessary to his protection. A valid title in the plaintiff is essential, but not of itself sufficient to authorize the appointment; there must be, besides, real danger of loss.⁵ A receiver will be appointed in a partition suit, pending the action, when it is necessary to preserve the property from serious loss.⁶ It is probable that a receiver may be allowed pending an action to recover the possession of real estate, in a case of such destructive waste by the defendant as would indicate his total want of confidence in

¹ Sea Ins. Co. v. Stebbins, 8 Paige, 565.

² Quinn v. Brittain, 3 Edw., 314.

³ Jenkins v. Hinman, 5 Paige, 309.

⁴ Patten v. Accessory Trans. Co., 4

Abb., 235; 13 How., 502; Bayard v. Fellows, 28 Barb., 452.

⁵ People v. Mayor of N. Y., 10 Abb., 111; reversing, 8 Abb., 7.

⁶ Pignole v. Bushe, 28 How., 9.

his own claim.¹ But a receiver will not be allowed in favor of a mortgagee, on the ground of waste; an injunction is the proper remedy.²

17. But where, either by action, or proceedings in partition, or division, or for the construction of a last will and testament, an estate has been brought within the possession, direction or control of the supreme court of this state, which shall have acquired jurisdiction over the same, such supreme court may, upon the death of the surviving executor of said will and testament, and during the pendency of such action or proceedings, and until they are finally carried into effect, appoint a receiver of said estate, upon such terms and conditions, and upon such notice to all parties and persons interested, as said court shall direct, and upon such order as to security or otherwise, as to said supreme court may seem expedient; and to enable it to carry into effect its orders and decrees, in relation to said estate, such receiver, when appointed, shall be the successor in interest of said surviving executor, and shall have like power and authority as administrators with the will annexed, appointed by the surrogate, but subject to the order of said supreme court in the premises.³

18. In an action for specific performance, where it appears that the purchaser can be compelled to execute a contract, the court will appoint a receiver.⁴ Thus, a receiver was appointed where a party had received mortgage money in advance, and had not executed the mortgage according to agreement.⁵ So, where a party takes possession of an estate under an agreement to pay money, but afterwards refuses to perform his covenants, the court

¹ Talbot v. Scott, 4 Kay & John., 126, 133; see Edw. on Receivers, 445.

² Robinson v. Preswick, 3 Edw. Ch., 246.

³ Sec. 45, art. 3, tit. 2, chap. 6, page

3, of the Revised Statutes; as am'd, 1863, chap. 460, page 804.

⁴ Edw. on Receivers, 552.

⁵ Shakel v. Marlborough, 4 Mad. Ch., 463.

will grant a receiver.¹ So, a receiver has been appointed in a suit, for the specific performance of an agreement to purchase an estate, against the purchaser, after an answer upon the lien for the remainder of the purchase money, and where there has been a mixed possession, and his insolvency and intention are admitted.²

19. The proper use of joint property by one joint tenant, will not, as a general rule, be restrained or a receiver appointed, unless abuse be reasonably apprehended, or in a case where security has been given for a due accounting. But where there is any doubt of the safety of the fund, the application will almost be of course.³ Whether a receiver will be appointed in any case between tenants in common, is a matter of doubt. The cases in which a receiver has been appointed between such tenants, are very unsatisfactory, and can hardly be regarded as precedents.⁴

20. Pending proceeding for the appointment of a committee of a lunatic, the court may, in urgent cases, appoint a receiver of the property.⁵ Contrary to the general rule, such receiver may be appointed on petition only, without any bill having been filed as is requisite in other cases.⁶ By the act of April 28, 1845, receivers and committees of lunatics and habitual drunkards, appointed by any order or decree, may sue, in their own names, for any debt, claim or demand transferred to them or to the possession and control of which they are entitled as such receiver or committee. And when authorized to sell such demands, the purchaser of the same may sue and recover therefor in his own name, but shall give such security for costs to the defendant as the court in which such suit is brought,

¹ Free v. Hinde, 6 Mad. Ch., 7.

ing Tyson v. Fairlough, 2 Sim. & S., 142.

² Hall v. Jenkinson, 2 Ves. & B., 225.

⁵ In re Heli, 3 Atk., 635.

³ Dunham v. Jarvis, 8 Barb., 88.

⁶ Ex parte Whitfield, 2 Atk., 147.

⁴ See Edw. on Receivers, 552; cit-

may direct. But the above statute does not have the effect to vest the receiver with the title to the real estate by the mere order of the court and without an actual conveyance from the party to the suit in whom such legal title is vested.¹

21. If an infant's estate is in danger, a receiver can be appointed immediately after filing a bill.² The receiver of an infant's estate should never have his bond or recognizance discharged until one year after the infant has attained his age. This is for the purpose of giving the infant ample opportunity to examine the accounts.³

22. Where a person takes a conveyance of a legal estate subject to equitable charges, which he does not pay or keep down, a receiver may be appointed.⁴ So, where lands are charged with the payment of an annual sum, a receiver may be appointed as a means of enforcing payment.⁵ Therefore, where a tenant for life neglects to discharge the ordinary taxes, or other charges on the estate which he is equitably bound to pay, a receiver will be appointed for so much of the rents and profits as may be necessary for that purpose.⁶

23. In an action for divorce on the ground of adultery, the injunction, receiver, and *ne exeat*, may all be properly made use of to aid the court in doing justice between the parties.⁷

¹ Wilson v. Wilson, 1 Barb. Ch. R., 592.

² Edw. on Receivers, 549.

³ Id.; In re Van Horne, 7 Paige, 46.

⁴ Pritchard v. Fleetwood, 1 Meriv., 55.

⁵ Owing's case, 1 Bland, 297.

⁶ Cairns v. Chabert, 3 Edw., 312.

⁷ Kirby v. Kirby, 1 Paige, 261.

SECTION IV.

AFTER JUDGMENT.

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| 1. Under subdivisions 2 and 3 of § 244. | 5. Where judgment debtor refuses to apply property. |
| 2. After judgment to carry the judgment into effect. | 6. How and when receiver appointed. |
| 3. After judgment to dispose of property. | 7. In creditor's actions, Sup. Pro, etc. |
| 4. To preserve property pending an appeal. | |

1. The second subdivision of section 244 provides for the appointment of a receiver "after judgment, to carry the judgment into effect;" and the third subdivision provides for a receiver "after judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment."

2. The former of these provisions may, perhaps, be construed to embrace all cases of the sequestration of property, so that instead of issuing a writ and sequestrating the property of a defendant, who is in contempt for disobeying a judgment, and who persists in such disobedience, as was the practice in the late court of chancery, the simpler, and no less efficient remedy of appointing a receiver over such property may be adopted.¹ So, cases sometimes arise, in which the usual modes of enforcing a judgment requiring some specific act to be done, as by execution, process for contempt, or by writ of assistance, injunction or sequestration are ineffectual, as for example,

¹ Van Sant. Eq. Pr., 643; see *Franklin v. Colquhoun*, 3 Swans., 389, note.

where a conveyance is directed to be made, or satisfaction of an instrument acknowledged, and the party is absent, so as not to be amenable to process of contempt, and has no property to be sequestered. In such cases the court may appoint a referee or a receiver, and authorize him to make the conveyance, acknowledge, etc.¹ Referees or receivers are also appointed in mortgage and partition cases to carry out the provisions of the judgment therein, by making sales of the premises, executing conveyances and disposing of the proceeds.²

3. In relation to the first clause of the third subdivision providing for the appointment of a receiver "after judgment, to dispose of the property according to the judgment," it is thought to contemplate powers and duties, broader and more extended than are the powers and duties of referees appointed to sell property under section 287 of the Code. It is created "to dispose of *the* property according to the judgment," that is, the property in litigation, any property personal as well as real, notes, bills, and choses in action, with all the incidental powers in regard to such property which the law and the practice of the court confer upon receivers, and which a mere referee does not possess, he being limited in his powers and duties by the specific direction and authority contained in the judgment.³

4. A receiver may be appointed also to preserve property pending an appeal. By section 336, it is provided that, "If the judgment appealed from direct the assignment or delivery of documents, or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into court, or placed in the custody of such

¹ See *Franklin v. Colquhon*, 3 Swans., 389, note.

² Id.

³ See *Van Sant. Eq. Pr.*, 644.

officer or receiver as the court shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court, or a judge thereof, or county judge, shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal."

5. So, where an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment, a receiver is proper. The remedy provided by the second subdivision of section 292 is similar, and is usually resorted to in preference to the above. The order is made in the same manner as in cases under subdivision one of section 244, and is based on proof of the recovery of the judgment, the issuing and return of the execution unsatisfied, in whole or in part and the refusal of the debtor to apply his property in satisfaction of the judgment.

6. The receiver contemplated by either of the provisions of subdivision 2 and 3 above cited, is to be appointed in all respects in a manner similar to receivers pending an action, and the order and proceedings are substantially the same. He is not appointed by the judgment or decree, but *after* judgment, and there must be a special application for the purpose, upon notice to the debtor.¹ Such receiver is also vested with the same powers and duties, and is governed by the same rules as receivers in an action.

7. Receivers in creditor's actions come properly under these two subdivisions, as they are usually appointed to carry the judgment into effect and to dispose of the property according to the judgment. So, also, to a great degree do receivers in proceeding supplementary to execution. I shall, therefore, treat of those subjects in the

¹ Boylan v. Byrne, 1 Malloy, 29.

following two sections. So, it would be proper to arrange under these subdivisions, the practice relating to receivers appointed after a judgment at law or a decree in equity, against a corporation, and execution returned unsatisfied. But I have thought it better to treat of that subject under the head of receivers of corporation.

SECTION V.

IN SUPPLEMENTARY PROCEEDINGS.

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| <ol style="list-style-type: none"> 1. § 298. Receivers in supplementary proceedings. 2. When appointed. 3. Where the examination has not disclosed property. 4. Can be appointed in proceedings under § 294. 5. When may be appointed before return of execution. 6. May be where defendant was arrested by warrant under sub 4, § 292. Also on voluntary appearance of defendant. 7. At what time appointment may be made. 8. Notice of application to debtor and third persons. 9. By whom appointed; reference to select. 10. Receiver under control of court. 11. Order how drawn; order to be filed, and copy given to receiver. 12. Bond by receiver, its form and execution. 13. When bond dispensed with. | <ol style="list-style-type: none"> 14. When property vests in receiver. 15. When the property vested in the receiver prior to the amendment of 1862. 16. What property vests in receiver. 17. Receiver entitled to immediate possession of property. 18-20. Powers and duties of receivers herein. 21. Only one receiver to be appointed. 22. Restraining debtor from disposing of property. 23. Receiver takes debtor's property subject to liens. 24. § 299. Where third person claims property, etc. 25. In what cases proceedings under this section may be maintained. 26. To what cases the section applies. 27. What claim of interest is intended. 28. Nature of the injunction herein provided. 29. How served. 30. How long it continues in force. |
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1. "The judge may, also, by order, appoint a receiver of the property of the judgment debtor, in the same manner, and with the like authority, as if the appointment was made by the court, according to section 244. But before the appointment of such receiver, the judge shall ascertain, if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said

receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The judge may, also, by order, forbid a transfer or other disposition of the property of the judgment debtor, not exempt from execution, and any interference therewith. Whenever the judge shall grant an order for the appointment of a receiver of the property of the judgment debtor, the same shall be filed in the office of the clerk of the county where the judgment roll in the action or transcript from justice's judgment, upon which the proceedings are taken, is filed; and the said clerk shall record the order in a book to be kept for that purpose, in his office, to be called "book of orders appointing receivers of judgment debtors," and shall note the time of the filing of said order therein. A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor from the time of the filing and recording of the order as aforesaid. The receiver of the judgment debtor shall be subject to the direction and control of the court in which the judgment was obtained, upon which the proceedings are founded; or if the judgment is upon a transcript from justice's court, filed in the county clerk's office, then he shall be subject to the direction and control of the county court. But before he shall be vested with any real property of such judgment debtor, a certified copy of said order shall also be filed and recorded in the office of the clerk of the county in which any real estate of such judgment debtor sought to be affected by such order is situated, and, also, in the office of the clerk of the county in which such judgment debtor resides."¹

2. Where the plaintiff has perfected judgment and has issued an execution thereon which has been duly returned

¹ Code, § 298.

unsatisfied, in whole or in part, it is a matter of course, on his application to reach the equitable property of the defendant, to appoint a receiver. And a plaintiff should always make such an application when he has obtained an injunction against the judgment debtor, to protect the property and effectuate his lien.¹ On such application the court cannot go behind the judgment to examine into the merits of the action in any respect.² Where, however, the judgment debtor's property is of such a nature, or so situated, that it can be applied to the satisfaction of the judgment by an order of the judge, under section 297, a receiver will be unnecessary.

3. It is no answer to the application for a receiver, that the examination has not shown the debtor to be possessed of, or to be the owner of any property. The creditor proceeds at the peril of costs, if there is no property; and if there is nothing for the receiver to take, the debtor cannot be injured by the appointment.³ Nor is it any objection to the appointment of a receiver that the debtor has no property, other than an equity of redemption which he is willing to have sold under execution.⁴ But the practice in the superior court of New York seems to have been different. It is stated to have been the course there, where the plaintiff had wholly failed to discover property, to discharge the injunction order, and hence the ground for the appointment of a receiver failed.⁵

4. Some of the courts hold that to authorize the appointment of a receiver under this section, the proceedings should be against the debtor, to reach his property generally, and that the debtor should have notice of the application; that is, that a receiver can only be had

¹ *Lent v. McQueen*, 15 How., 313; *Webb v. Overman*, 6 Abb., 92.

² *Lent v. McQueen*, *supra*.

³ *Myre's case*, 2 Abb., 476; see also *Webb v. Overman*, 6 Abb., 92.

⁴ *Bailey v. Lane*, 15 Abb., 373, note.

⁵ *Hoff. Pro Rem.* 524.

when the proceedings are instituted under section 292, and that the proceedings provided by section 294 is simply a proceeding in aid of that under section 292, and must be had in connection with it, and cannot be resorted to independently of any proceedings against such judgment debtor.¹ The practice is, however, settled in the supreme court of the first judicial district, to allow a proceeding under section 294 independent of, and without any resort to, a proceeding under section 292. But proceeding under the latter section is required to be first instituted in all cases where it is practicable.² Whether or not notice shall be given to the debtor is held to be in the discretion of the judge making the order.³

5. Where the proceedings against the debtor are under the second subdivision of section 292, a receiver may be appointed before the return of the execution.⁴ This would seem to be clear upon its face, but, in *Darrow v. Lee*, the New York common pleas held otherwise.⁵

6. A receiver may also be appointed where the defendant has been arrested by virtue of a warrant under subdivision four of section 292. The object of the warrant is to secure the defendant from absconding, and thus to compel an examination, and a reference may be had to take such examination, and a receiver appointed the same as in other cases.⁶ So, where the judge has jurisdiction of the subject matter, a receiver may be appointed upon a *voluntary* appearance and examination of the judgment debtor, without affidavit or order;⁷ and the regularity of the appointment, in that or any other case, cannot be questioned collaterally by a third person.⁸

¹ *Kemp v. Harding*, 4 How., 178; *Hinds v. Canandaigua R. R. Co.*, 10 How., 489; *Sherwood v. Buf. & N. Y. City R. R. Co.*, 12 How., 136; *Barker v. Johnson*, 4 Abb., 435.

² *Ward v. Beebe*, 15 Abb., 372; 17 Abb., 1; *Holmes v. Jordan*, 15 Abb., 410, note.

³ *Id.*; see, however, *Gibson v. Hagerty*, 15 Abb., 406; 23 How., 260.

⁴ *People v. Hulburt*, 5 How., 446. 16 Abb., 215.

⁵ *Wilson v. Andrews*, 9 How., 39.

⁷ *Bingham v. Disbrow*, 14 Abb., 251; 37 Barb., 24.

⁸ *Tyler v. Whitney*, 12 Abb., 465.

7. If the examination has been had before the judge, and the judgment debtor is present, and there are no other supplementary proceedings against him, the application for a receiver may be made immediately on the close of the examination,¹ or at any stage of the proceedings, in the discretion of the officer, when property is disclosed of such a nature that it might be dissipated by the delay incident upon a continued examination.² If the appointment is made during the progress of the examination, it seems that the examination may be continued afterwards the same as before.³

8. But, if the examination has been had before a referee, notice of the application should be given to the debtor.⁴ So, if there are other proceedings pending against him, notice must be given to the plaintiff therein. And it is made the duty of the judge, by the foregoing section, to ascertain, if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor. And this is equally the duty of the referee, where the examination is had before one. But this requirement is directory merely, and any failure to comply therewith, or to give the other creditors notice, does not avoid the order appointing a receiver.⁵ No person is entitled to notice on the ground that he has a lien on the fund sought to be reached, unless he has supplementary proceedings actually pending against the debtor.⁶ Where it is necessary to give notice either to the judgment debtor or to third

¹ *Todd v. Crook*, 4 Sandf., 694.

² *People v. Mead*, 29 How., 360.

³ *Id.*

⁴ *Kemp v. Harding*, 4 How., 178; *Gibson v. Haggerty*, 15 Abb., 406; 23 How., 260. It is the practice in the First District to appoint a receiver under § 294, without notice to the debtor where such notice can-

not be given, *Ward v. Beebe*, 17 Abb., 1; 15 id., 373; *Seeley v. Garrison*, 10 Abb., 460.

⁵ *Lottimer v. Lord*, 4 E. D. Smith, 183.

⁶ *Corning v. Glenville Woolen Co.*, 14 Abb., 339; see also *Myriok v. Selden*, 36 Barb., 15.

parties, a notice of less than eight days will suffice.¹ It is the practice at the chambers of the supreme court of the first district to require a notice of from two to four days.²

9. The appointment of a receiver should, except in the first district, be made by the same judge who granted the original order instituting the proceedings, and no other judge has the power to interfere. Thus, where the original order was granted by a county judge, a justice of the supreme court has no authority to appoint the receiver.³ The judge may order a reference to *select* a proper person for a receiver, to determine the amount of security to be required and to approve of the sureties offered by the proposed receiver, but it is held that the judge cannot order a reference to *appoint* a receiver as is frequently done in appointing receivers under § 244, and that an appointment made by a referee is void.⁴

10. Though the receiver is appointed by a judge, he is, nevertheless, under the control of the court in which the judgment was obtained upon which the proceedings are founded, and not of the judge who appointed him, and must apply to such court for all directions and instructions necessary to the proper execution of his trust. Where the judgment is upon a transcript from justice's court, filed in county clerk's office, the receiver is subject to the control of the county court.⁵

11. The order appointing the receiver should be carefully drawn, and should be sufficiently full and definite to enable the receiver to know the extent of his powers and duties. It would be better to make such order ample enough to cover the provisions of the 92d rule of the supreme court. After the order is granted, the plaintiff's

¹ Leggett v. Sloan, 24 How., 479.

² Riddle's Sup. Pro., 136.

³ Smith v. Johnson, 7 How., 89;
see Hatch v. Weyburn, 8 How., 165.

⁴ Wood v. Lambert, cited in Hoff.
Pro Rem, 498; Sp'l, T. Superior
Court, Hoffman, Justice.

⁵ § 298, *supra*.

attorney should file the same in the office of the clerk of the county where the judgment roll in the action, or transcript from justice's judgment, upon which the proceedings are taken, is filed. It is the duty of the clerk to record such order in a book to be kept for that purpose. The plaintiff's attorney should procure from such clerk a certified copy of such order and deliver the same to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor from the time of the filing and recording of the order.¹ (See form No. 116).

12. But before the receiver's appointment is complete so as to authorize him to act and take possession of the debtor's property, he must execute and file the required bond.² He is, however, as an officer of the court, vested with the debtor's property immediately on the filing and recording of the order; so that such property cannot be seized by the sheriff by virtue of an execution or attachment between the appointment and the filing of the required bond. Should he fail to give the required bond, the order will not be thereby invalidated, but the effect is the same as if he had instantly complied, and had afterwards been removed and another appointed in his place.³ The penalty of the bond is usually double the amount of the personal property, together with double the yearly value or rental of the real estate.⁴ It is generally in the form of a penal bond, made to the people of the state of New York, conditioned that the receiver shall, in all things, well and truly perform the duties of his office in conformity to the rules and practice of the court, and pay and apply what he shall receive or have in charge, as he may from time to time be ordered by the court. The

¹ § 298, *supra*.

² *Voorhies v. Seymour*, 26 Barb., 570; *Conger v. Sands*, 19 How., 8.

³ See *Steele v. Sturges*, 5 Abb., 442.

⁴ *Edw. on Receivers*, 92.

usual course is to require the bond to be executed by the receiver and two sureties;¹ the latter to be residents and householders or freeholders within the state, and worth severally the amount of the penalty mentioned in the bond. After the bond has been executed by the receiver and his sureties, it must be duly proved or acknowledged in like manner as deeds of real estate, before the same can be received or filed;² and the sureties should justify by an affidavit of justification annexed to the bond and to be filed therewith. The approval of the judge should be indorsed upon the undertaking. If the undertaking is defective in any manner not fatal, it may be remedied by amendment.³ The bond, having been duly executed, acknowledged, and approved, is to be filed with the clerk of the court where the judgment roll is filed, or, where the receiver is appointed on a judgment rendered in an inferior court, where the transcript of such judgment has been filed. If the filing of such bond has been inadvertently omitted, the court may order it to be filed *nunc pro tunc*.⁴ But, ordinarily, the appointment is not considered as complete until the bond is filed.⁵

13. Where a receiver has given ample security on his first appointment, the judge can dispense with further security on appointing him, pending his first appointment, receiver of the same estate in another action.⁶

14. The receiver becomes vested with the debtor's property and effects from the date of filing and recording the order in the clerk's office, as provided in the above section, and of his real property from the time of filing and recording such order in the office of the clerk of the county in which any real estate of such judgment debtor

¹ Edw. on Receivers, 89.

² Sup. Court, Rule 6.

³ See Conklin v. Dutcher, 5 How., 386.

⁴ Whiteside v. Prendergast, 2 Barb. Ch. R., 471.

⁵ Voorhies v. Seymour, 26 Barb., 570; Conger v. Sands, 19 How., 8.

⁶ Banks v. Potter, 21 How., 469.

sought to be affected by such order is situated, and also in the office of the clerk of the county where such judgment debtor resides.¹ Where the defendant is a non-resident, the latter clause is inapplicable. The language of the section would seem to imply that an *actual recording* would be necessary, before the receiver could become vested with any property. My own impression is, however, that the order, like deeds of real estate under 1 Revised Statutes, p. 760, § 24, would be considered as recorded from the time of its delivery to the clerk for that purpose. If it were otherwise, a delay in recording might greatly prejudice or defeat the rights of the plaintiff.

15. Prior to the amendments of section 298, made in 1862 and 1863, the receiver did not become vested with the debtor's property, until he had filed the requisite security; but when such security was filed, his title related back to the date of the order appointing him, and was not affected by an intermediate levy.² The amendment of 1863 settles the disputed question as to whether the receiver became vested with the debtor's real property without an assignment from him.³

16. The property that vests in the receiver is only such as the debtor owned at the time of the granting of the order for his examination.⁴ That acquired after the granting of such order remains in the debtor, as does also that acquired after the appointment of the receiver.⁵ A receiver, by mere force of his appointment, does not become vested with a title to the interest of the judgment debtor, as *cestui que trust*, in the income of a fund inalienable by such *cestui que trust*.⁶ Nor does he become vested with

¹ § 298, *supra*, as am'd in 1862, 1863.

² Rutter v. Tallis, 5 Sandf., 610; Steele v. Sturgis, 5 Abb., 442.

³ See Cbautauque Co. Bank v. Risley, 19 N. Y. R., 370; Porter v. Williams, 5 Seld., 142.

⁴ Campbell v. Genet, 2 Hilton, 290.

⁵ Graff v. Bennett, 25 How., 470; Genet v. Foster, 18 How., 50.

⁶ Genet v. Foster, *supra*.

the right of action for taking and converting property exempt from execution, nor with the judgment recovered thereon.¹

17. When the receiver's title has become perfect by the filing and recording of the order, and the filing of the bond, he is entitled to the immediate possession and control of all such property and effects of the debtor as are in his possession, or in the possession of a third person not claiming any right or interest in them. If a third party, alleged to hold property of the debtor, claims an interest in the property adverse to such debtor, the receiver can only recover such property by an action against such third person.² But all these claims of adverse title or interest must antedate the *vesting* of the debtor's property in the receiver; for any such claim founded on a transfer from the debtor, after that period, is utterly void and will be disregarded.³ The order appointing a receiver should contain a clause directing the debtor to deliver his property to the receiver; but if the order does not contain such direction, the receiver should make a special application for an order to that effect.⁴ Any refusal to comply with such order will be punished as a contempt.

18. A receiver appointed under this section possesses, generally, the ordinary powers of one appointed under section 244. He represents all the creditors of the judgment debtor who have proceedings pending, as well as the judgment debtor himself,⁵ and is to administer the property vested in him, under the direction of the court, for the benefit of all concerned, first discharging those debts which have acquired an equitable priority.⁶ He can im-

¹ *Andrews v. Rowan*, 28 How., 126.

² Code, § 299, *Rodman v. Henry*, 17 N. Y. R., 482; *Teller v. Randall*, 40 Barb., 242.

³ See *Rodman v. Henry*, *supra*.

⁴ *Watson v. Fitzsimmons*, 6 Duer, 629.

⁵ *Bostwick v. Beizer*, 10 Abb., 197; *Seymour v. Wilson*, 15 How., 355.

⁶ *Bostwick v. Beizer*, *supra*.

peach fraudulent or illegal transfers made by the debtor, as effectually as the creditor himself could,¹ and can sue in his own name as receiver.² But if the transfer of the property is fair and valid, and has taken place before such property became vested in the receiver, he acquires no interest in it whatever. So, if there is a valid lien upon the property, it binds the receiver as fully as the debtor, and he acquires only such interest in the property as the debtor had at the date of the vesting.³ The receiver may appoint an agent to act for him; but the appointment should be in writing, and should be exhibited to third parties when the agent is dealing with them on behalf of the receiver.⁴

19. Every receiver of the property and effects of the debtor shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may, also, sue in the name of a debtor, where it is necessary or proper for him to do so; and he may apply for and obtain an order of course, that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver, and pay their rents to him. He shall also be permitted to make leases, from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor without the special order of the court, until after judgment in the cause. He is not to be allowed for the costs of any suit brought by him against an insolvent from

¹ *Seymour v. Wilson*, 15 How., 355; *Bostwick v. Beizer*, *supra*.

² *Porter v. Williams*, 5 Seld., 143.

³ *Gardener v. Smith*, 29 Barb., 68; *Voorhies v. Seymour*, 26 Barb., 585.

⁴ ——— v. *Lindsey*, 15 Vesey, 91; see *People v. King*, 9 How., 97.

whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands. But he may, by leave of the court, sell such desperate debts, and all other doubtful claims to personal property, at public auction, giving at least ten days' public notice of the time and place of such sale."¹

20. The foregoing rule is a transcript from the 192d rule of the late court of chancery, defining the duties of a receiver appointed in a judgment creditor's suit. Although the rule authorizes the receiver to sue in the name of the debtor, where it is necessary or proper for him to do so, yet this does not seem to dispense with an indemnity on the fund from the receiver to protect the debtor against costs and damages on account of the use of his name. Nor does it, in fact, do away with the propriety of the receiver's obtaining leave of the court to sue in all cases, for if he sue without such leave, and it turn out not to be a "necessary and proper" case, or the defendant be an insolvent from whom he is unable to collect his costs, he will not be allowed his costs out of the trust fund.² It would be proper, and, indeed, preferable, so to draft the order appointing the receiver as to incorporate substantially the above rule of the court. If that is not done, and the debtor refuses to surrender his property peaceably, or to permit the receiver to take possession thereof, or if the tenants of the debtor's real estate refuse to attorn to him, or if it becomes necessary to sue, and in many other cases, it will be necessary for the receiver to apply to the court on notice for an order specially directing the required thing to be done.

21. It will be observed that the above section provides that no more than one receiver of the property of a judg-

¹ Sup. Court, Rule 92.

² See Edw. on Receivers, 481.

ment debtor shall be appointed. Where subsequent judgment creditors apply for a receiver, the original receiver is extended so as to cover the subsequent case. Where two or more happen to be appointed, and there is a conflict between them, the date of appointment, or of order of reference to select, will determine the priority between them.¹

22. The judge may, also, by order, forbid a transfer or other disposition of the property of the judgment debtor, not exempt from execution, and any interference therewith.² It was provided by a rule of the old court of chancery (and it may be regarded as a good guide herein) that no injunction issued upon any creditor's bill shall be construed to prevent the debtor from receiving and applying to the support of himself or his family, the proceeds of his earnings, subsequent to the service of the injunction order on him; nor from defraying the expenses of the suit, or to prevent him from complying with any order of this court made in any other cause, to assign and deliver his property or effects to a receiver, or to restrain him from making the necessary assignment to obtain his discharge under the insolvent laws, unless an express provision to that effect is contained in the injunction. Neither shall such injunction prevent any other creditor from levying upon such property of the debtor as he may be able to find, and to reach by execution, previous to the entry of an order for a sequestration, or for the appointment of a receiver.³ The injunction provided for under this section is similar to that provided in the next section against third persons, and is governed by like rules.⁴

23. The receiver of the debtor's property appointed in supplementary proceedings, like other receivers, takes

¹ Deming v. N. Y. Marble Co., 12 Abb., 66; Lottimer v. Lord, 4 E. D. Smith, 183.

² § 299, *supra*.

³ Chanc. Rule 195.

⁴ See *post*, p. 530.

the debtor's property subject to all valid liens existing upon it at the time the property vested in such receiver. Therefore, where the receiver has been appointed after the goods have been levied upon by another creditor, such receiver holds them subject to such levy, and he will be liable upon his promise made to the officer to sell the goods and apply the proceeds upon the execution levied. The title of the receiver only relates back to the date of the order appointing him. The issuing and service of an order instituting proceedings supplementary to execution create no lien against other creditors, who, in the meantime, discover property subject to execution and levy upon the same.¹

24. "If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation by the receiver; but the judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judgment and execution; but such order may be modified or dissolved by the judge granting the same, at any time on such security as he shall direct."²

25. It has been held that the proceedings under this section can only be had in connection with proceedings under section 294; and that before an injunction should be granted as above provided against a person or corporation, such person or corporation should have been examined under section 294.³ Thus, on a motion to re-

¹ Becker v. Torrance, 31 N. Y. R., 356; Woodman v. Goodenough, 18 Abb., 265; King v. Tuska, 1 Duer, 635.

² Code, § 299.

³ Edmonston v. McLoud, 19 Barb.,

strain a third person from disposing of property of the debtor, the motion was denied because the affidavit on which the motion was founded did not show that any order had been made under section 294, requiring such third person to appear. Bosworth, J., remarked, "This seems to be necessary in order to make him a party to the proceedings, and to enable the court to properly enjoin him under section 299."¹

26. This section does not take away the old right of a judgment creditor to maintain an action in the nature of a creditor's bill, against his debtor and a fraudulent assignee.² The section is restricted to receiverships under the proceedings supplementary to execution, so that, in those cases, the receiver only can bring action to recover property or debts from persons or corporations in possession thereof, or indebted to the judgment debtor, but who claim an interest adverse to him, or deny the indebtedness.³ The section also applies only to actions against third persons, not to those between the judgment creditor and the judgment debtor alone.⁴

27. The claim of interest as intended in the foregoing section means something more than a mere naked assertion. The party claiming the interest must show some ground or foundation for it, capable of forming an issue of fact for trial, and the court or judge, entertaining the proceedings, has the power to determine whether any sufficient claim exists, or whether it is a mere pretense.⁵ But a denial of indebtedness by a third party, however, seems to necessitate a proceeding under this section.⁶ And, it may be further observed that all these claims of adverse title or interest must antedate the *vesting* of the property

¹ King v. Tuska, *supra*.

² Goodyear v. Betts, 7 How., 187;
Catlin v. Doughty, 12 How., 457.

³ *Id.*; and see Edmonston v. M'-
Loud, *supra*.

⁴ Catlin v. Doughty, *supra*.

⁵ Rid. Sup. Pro., 125, 126.

⁶ See People v. Hulburt, 5 How.,

446.

in the receiver, for any such claim by virtue of a transfer or otherwise made after that period, is utterly void and will be disregarded.¹

28. The order herein provided, to restrain a third party claiming an interest in the property from transferring or otherwise disposing of such property is a different remedy from the provisional injunction, and governed by different rules. No copy of the affidavit on which the order is granted need be served with such order on the defendant, nor is security on the part of the creditor required. The granting of the order rests in the sound discretion of the judge. It may be made at the commencement of, or at any time during the proceedings.² But no person can be enjoined unless he has been proceeded against under section 294.³

29. If the order restraining the third person is made by the court, it must be served like a court order, that is, it must be entered and a certified copy obtained and served on such third party without exhibition of the original; or a copy may be served and a certified copy shown.⁴ But if made by the judge, it may be served in like manner as supplementary orders, by delivering to and leaving with the party to be enjoined personally a copy, and at the same time exhibiting to him the original. If addressed in the ordinary way to a corporation and its agents, etc., and served on the president, it will be sufficient.⁵ So, knowledge of the injunction, information of its contents, or presence in court when it was made, will be sufficient to impose upon the debtor the duty of obeying it.⁶

30. The injunction continues in force till the matter in

¹ See *Rodman v. Henry*, 17 N. Y. R., 482.

² *Green v. Bullard*, 8 How., 313.

³ *King v. Tuska*, 1 Duer, 635; *Edmonston v. M'Loud*, 19 Barb., 356.

⁴ See *Mayor of N. Y. v. Conover*, 5 Abb., 244; *Smith v. Smith*, 14 Abb., 130, 468.

⁵ See *People v. Sturtevant*, 5 Seld., 277; see, also, *Batterman v. Finin*, 32 How., 501.

⁶ *Livingston v. Swift*, 23 How., 1; see, also, *Edmonston v. M'Loud*, 19 Barb., 361.

controversy is fully disposed of according to the judgment in the receiver's action, if one is brought, or until it is dissolved or abandoned. Any party aggrieved by such injunction may move to have the same dissolved or modified, but the motion should be on notice to the creditors.¹

¹See Rid. Sup. Pro., 180.

SECTION VI.

RECEIVERS IN CREDITORS' SUITS.

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| <ol style="list-style-type: none"> 1. When action may be maintained by judgment creditor. 2. Fraudulent conveyances and judgments. 3. Actions to cancel prior judgments which have been paid; concerning <i>bona fide</i> purchaser under fraudulent judgment. 4. Creditor must have judgment, and execution issued and returned. 5. Receivers in judgment creditor's action. | <ol style="list-style-type: none"> 6. May be appointed before answer; for whose benefit he holds property; opposing application. 7. Receiver's powers and duties. 8. Where property has been fraudulently conveyed, creditor may elect to sell it under his execution, or bring action. 9. Creditor cannot issue execution on judgment in the action after appointment of receiver. 10. Powers and duties same as in supplementary proceedings. |
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1. The Code has not taken away the right of a judgment creditor under 2 Revised Statutes, 173, sections 38, 39, to commence an action against a judgment debtor and his assignee to set aside a fraudulent assignment and to obtain a receiver.¹ But it is otherwise where such action is against the judgment debtor and third persons to discover property belonging to the former, and such remedy can be had now only by supplementary proceedings.² The remedy was formerly known as a creditor's bill, but, since the Code, the action is commenced by summons and complaint, the same as other actions.³

2. It is provided by the statutes that all conveyances made with the intent to hinder, delay or defraud creditors, shall be void;⁴ also, that a bill may be filed to discover fraud in confessing a judgment, purporting to be for a sum or debt due, when, in fact, nothing, or only a part of

¹ Edw. on Receivers, 364; Good-year v. Betts, 7 How., 187; Catlin v. Doughty, 12 How., 459.

² Orr's Case, 2 Abb., 457; Sale v. Lawson, 4 Sandf., 718.

³ Catlin v. Doughty, *supra*.

⁴ 2 R. S., 137.

the sum mentioned in the warrant of attorney or judgment is due.¹ An assignment will be set aside as fraudulent and void where, by its express terms, the assignees are authorized to sell the property on credit, and a receiver will be appointed.² And it has been held that unless an assignment for the benefit of creditors is accompanied by an immediate delivery of the assigned property, and is followed by an actual and continued change of possession, the court will presume it fraudulent and void as against creditors, unless they are satisfied that it was made in good faith and without any intent to defraud.³

3. A judgment creditor may maintain an action to obtain the cancellation of a prior judgment, which is an apparent lien upon the lands of his debtor, but which he alleges has been paid, and this without charging any collusion on the part of the debtor to keep the judgment on foot to defraud creditors.⁴ A party who, in good faith, purchased the property at a sale under a fraudulent judgment and assignment, should not be held liable in a creditor's action brought to set aside the judgment and assignment, and to reach the property.⁵

4. To enable a creditor to maintain an action to set aside a fraudulent transfer, or to remove any impediment to the execution, he must be a judgment creditor, a simple contract creditor cannot maintain the action.⁶ However, an attaching creditor has, before judgment in the attachment suit, such a specific lien as will enable him to bring the suit.⁷ The creditor must also show that he has exhausted his remedies at law before resorting to this remedy; that is, that an execution has been issued and

¹ 2 R. S., 173; see, also, *Sewall v. R. M. & I. Russell*, 2 Paige, 175.

² *Barney v. Griffin*, 2 Coms., 365; *Porter v. Williams*, 5 Seld., 142.

³ *Connah v. Sedgwick*, 1 Barb., 210.

⁴ *Shaw v. Dwight*, 27 N. Y. R., 244.

⁵ *Dunham v. Waterman*, 6 Abb., 357; 17 N. Y. R., 9.

⁶ *Reubens v. Joel*, 3 Kern., 488; *Cropsey v. McKinney*, 30 Barb., 47.

⁷ *Rinchey v. Stryker*, 26 How., 75; *Greenleaf v. Mumford*, 30 How., 30.

returned unsatisfied.¹ This is essential to the jurisdiction of the court though there be no property that can be reached by execution at law. And the execution should have been issued to the county in which the property is situated that is alleged to have been fraudulently assigned. Of course, to render such execution of force as to real property, the judgment must be first docketed, or a transcript thereof filed in such county.² It seems necessary, also, to issue the execution to every county in which any of the defendants reside.³ It is not essential, however, that the creditor await until the sixty days after the issuing of the execution, have elapsed, he may proceed at any time after the return of the execution.⁴ Nor is it necessary that the assignee of a judgment upon which an execution has been returned unsatisfied issue a new one before filing a creditor's bill thereon.⁵

5. The appointment of receivers is a matter of frequent occurrence in suits of this kind; indeed, it is declared to be a matter of course, where the equity of the complaint is not denied on the hearing of the application;⁶ or where the plaintiff shows a judgment perfected and execution issued thereon and returned in due form of law. Where an injunction has been obtained in the action to prevent the defendant from disposing of his property, it is the *duty* of the plaintiff, within a reasonable time, to move for a receiver to preserve and care for the property during the litigation.⁷

6. The application for the receiver may be made before

¹ Field v. Hunt, 22 How., 329; Field v. Chapman, 13 Abb., 320, same case; Millard v. Shaw, 4 How., 137; Dunlevy v. Tallmadge, 29 How., 397.

² Scholefield v. Hull, cited in Edw. on Receivers, 401; Millard v. Shaw, *supra*; Dix v. Briggs, 9 Paige, 595.

³ Millard v. Shaw, *supra*; see otherwise, Scholefield v. Hull, *supra*.

⁴ Forbes v. Waller, 25 N. Y. R., 430; Forbes v. Logan, 4 Bosw., 475; Knauth v. Bassett, 34 Barb., 31; Field v. Hunt, 23 How., 80.

⁵ Gleason v. Gage, 7 Paige, 121.
⁶ Bloodgood v. Clark, 4 Paige, 574; Lent v. McQueen, 15 How., 314.

⁷ Osborn v. Heyer, 2 Paige, 342;

answer, and the practice is to move for his appointment immediately after the service of the summons. But the debtor should have notice of the motion.¹ If the receiver be appointed he is not merely a trustee for the party at whose instance he was appointed, but holds the property for the benefit of all creditors who have commenced or shall commence similar suits during the continuance of his trust to be disposed of according to their legal or equitable priorities.² The application cannot be opposed on the ground that the judgment or execution was irregular. Such question can only be raised by a motion to set aside the irregular proceeding.³ But it seems to be otherwise where the judgment is fraudulent and collusive.⁴

7. The general powers and duties of receivers in creditor's actions are the same as ordinary receivers in most cases, for which see ante sections 1 and 2. In addition to this they have the powers and duties prescribed by rule 92 of the supreme court. They were also required by rule 194 of the old court of chancery to keep a separate account of any property or effects of the debtor which had been acquired since the commencement of the first suit, or which may have been assigned to them under the appointment.⁵

8. Where a judgment debtor has made a fraudulent conveyance of his property, the judgment creditor has his election, either to stand upon his judgment lien, and sell upon his execution, and leave the purchaser to impeach the conveyance; or to proceed by creditor's bill to annul the conveyance and have a receiver. Where he takes the latter course, and the conveyance is set aside, the title of the receiver to the real property and the title of any pur-

¹ *Bloodgood v. Clark*, 4 Paige, 574.

² *Edw. on Receivers*, 405.

³ *Lent v. McQueen*, 15 How., 314 ;
Hone v. Woolsey, 2 *Edw.*, 290.

⁴ *Sandford v. Sinclair*, 8 Paige, 374;

Shottenkirg v. Wheeler, 3 *John. Ch.*, 280.

⁵ *Edw. on Receivers*, 489.

chaser from him are derived from, and rest upon, the debtor's own conveyance to the receiver under the order of the court, and have no relation to the judgment, and are, therefore, subject to a judgment obtained after the judgment on which the bill is filed, but prior to the filing of such bill and the conveyance by the debtor to the receiver.¹

9. In a creditor's suit brought by the plaintiff on behalf of himself and others who may come in, the plaintiff cannot, after judgment, and the appointment of a receiver to collect the debts and assets and apply them to payment of the various creditors, issue execution on the judgment. The receiver only can enforce the judgment.²

10. For a full statement of the powers and duties of receivers in creditor's actions, see section previous under the head of receivers in supplementary proceedings. The principles, there stated, are equally applicable to receivers herein.

¹ Chautauque Co. Bank v. Risley,
19 N. Y. R., 369.

² Rigney v. Tallmadge, 19 Abb.,
16.

SECTION VII.

RECEIVERS OF CORPORATIONS.

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| <ol style="list-style-type: none"> 1. Under sub 4, § 244. Receivers of corporations. 2. Must be clear case to authorize. 3. What court may appoint. 4. In actions to vacate charter. 5. Actions by attorney general in name of the people. 6. Judgment of forfeiture against. 7. Restraining corporation and appointing receiver. 8. Cases provided by special statutes. 9. Not abolished by the Code. 10. Where execution against corporation returned unsatisfied. 11-12. Powers of receiver in such case. 13. Effect of the appointment of. 14. Further powers and duties. 15. Call meeting of creditors, etc. 16. Order of paying debts, and making dividends. 17. Second dividend, and how made. 18. Surplus, how disposed of. 19. Receiver subject to supreme court. 20. To render account to court, when and how. 21. Hearing thereon; account from time to time. 22. Dividends in case of banking corporations. 23. To make dividends as ordered by the court. 24. To pay over money to successor. 25. Is a trustee for both parties; appointment not impeachable collaterally. | <ol style="list-style-type: none"> 26. Assets, how distributed among creditors. 27. When corporation may satisfy judgment and have receiver discharged. 28. Proceedings against directors, etc., of a corporation. 29. Jurisdiction, how exercised. 30. On whose application. 31. Effect of suspending business, etc., for one year. 32. What acts amount to a suspension. 33. Voluntary dissolution. 34. Petition to be referred; appointing receiver. 35. Who may be receivers, and their powers. 36. Their general powers and duties. 37. Proceedings against insolvent banking and insurance corporations. 38. Appointing and duties of receiver thereupon. 39. When to file statements, to distribute moneys, etc. 40. Of mutual insurance companies to make assessments on premium notes. 41. Where officers have misapplied property. 42. In mutual insurance cases controversies may be referred. 43. Receivers of savings banks how to distribute money. 44. Compensation of receivers of corporations. |
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1. By the fourth subdivision of the section, it is provided that a receiver may be appointed: "In the cases provided in this Code, and by special statutes, when a corporation has been dissolved or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights ;

and, in like cases, of the property within this state of foreign corporations. Receivers of the property within this state of foreign, or other corporations shall be allowed such commissions as may be fixed by the court appointing them, not exceeding five per cent on the amount received and disbursed by them."

2. To authorize an injunction and receiver of a corporation, the case must be brought clearly within the provisions of the statute; and there must be a well grounded apprehension of injury about to be done.¹

3. The supreme court is the only court that has jurisdiction to wind up the affairs and appoint a receiver of a corporation, either domestic or foreign;² and it is also held that a county court has no jurisdiction to appoint a receiver in a statutory proceeding in relation to the property of a corporation.³

4. The "cases provided in this Code" are to be found in sections 429, 430, 432, 442 and 444. By section 429 it is provided that "an action may be brought by the attorney general, in the name of the people of this state, whenever the legislature shall so direct, against a corporation, for the purpose of vacating or annulling the act of incorporation, or an act renewing its corporate existence, on the ground that such act or renewal was procured upon some fraudulent suggestion or concealment of a material fact by the persons incorporated, or by some of them, or with their knowledge and consent." And, by section 430, it is provided that "an action may be brought by the attorney general, in the name of the people of this state, on leave granted by the supreme court, or a judge thereof, for the purpose of vacating the charter or annulling the existence of a corporation, other than municipal, whenever such cor-

¹ 1 Edw. Ch., 84; Kean v. Colt, 1 Duer, 608; Kattenstroth v. The Hals. Ch., 265. Astor Bank, 2 Duer, 632.

² Day v. U. S. Car Spring Co., 2 ³Wheaton v. Gates, 18 N. Y. R., 395.

poration shall : 1. Offend against any of the provisions of the act or acts creating, altering or renewing such corporation ; or, 2. Violate the provisions of any law by which such corporation shall have forfeited its charter by abuse of its powers ; or, 3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers ; or, 4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges or franchises ; or, 5. Whenever it shall exercise a franchise or privilege not conferred upon it by law. And it shall be the duty of the attorney general, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to apply for leave, and upon leave granted to bring the action in every case of public interest, and, also, in every other case in which satisfactory security shall be given to indemnify the people of this state against the costs and expenses to be incurred thereby."

5. By section 432 it is provided, among other things, that an action may be brought by the attorney general in the name of the people of this state, upon his own information or upon the complaint of any private party, against the parties offending in the following cases: 3. "When any association or number of persons shall act within this state as a corporation, without being duly incorporated."

6. "If it shall be adjudged that a corporation, against which an action shall have been brought pursuant to this chapter, has, by neglect, abuse or surrender, forfeited its corporate rights, privileges and franchises, judgment shall be rendered that the corporation be excluded from such corporate rights, privileges and franchises, and that the corporation be dissolved." ¹

¹ Code, § 442.

7. "When such judgment shall be rendered against a corporation, the court shall have the same power to restrain the corporation, to appoint a receiver of its property, and to take an account, and make distribution thereof, among its creditors, as are given in article three, title four, chapter eight of the third part of the Revised Statutes; and it shall be the duty of the attorney general, immediately after the rendition of such judgment, to institute proceedings for that purpose."¹

8. The cases provided by special statutes are to be found in the second and third articles of title four, chapter eight, part third of the Revised Statutes.² Those articles are entitled, "Of proceedings against corporations in equity, etc.," and "Of the voluntary dissolution of corporations." There are, also, several acts, enlarging or defining the powers and duties of receivers of corporations, which will be cited hereafter *in extenso*.

9. The proceedings against corporations in equity, as they are provided by the revised statutes, are by section 471 of the Code, preserved; and provision is made for securing them by civil action to be prosecuted in conformity with the Code. The powers which were before exercised by the chancellor over directors, managers, trustees and officers of corporations now vest in the supreme court.³

10. Whenever a judgment at law, or a decree in equity, shall be obtained against any corporation, incorporated under the laws of the state of New York, and an execution has been returned unsatisfied, in part or in whole, a receiver may be appointed to take charge of the property and effects of such corporation. The petition is to be made by the person obtaining such judgment or decree, or by his representatives.⁴ The judgment creditor may

¹ Code, § 444.

² 3 R. S., (5th ed.), 461.

³ 3 R. S. (5th ed.), 762; Edw. on Receivers, 163.

⁴ 2 R. S., 463, § 36.

proceed by bill or action, instead of by petition, and this will be a proper course where he intends, also, to proceed against the directors or stockholders, to charge them personally, in case the corporate property is insufficient to pay the debt.¹

11. Any receiver appointed by virtue of the foregoing section, has the same rights, power and authority, and is subject to the same obligations and duties, as are provided in article third, title fourth, chapter eight, part third of the Revised Statutes in relation to receivers appointed in case of the voluntary dissolution of a corporation.² The decisions in *Verplank v. Mercantile Insurance Company* (2 Paige, 448), and in *Mann v. Pentz* (3 Comst., 415), to the effect that such receiver was simply a common law receiver — without other authority than that conferred by the order appointing him — are no longer of force.

12. The provisions of the statute in relation to receivers in case of the voluntary dissolution of a corporation which are thus made applicable to receivers under section thirty-six, are as follows: Such receiver shall be vested with all the estate, real and personal, of such corporation, from the time of their having filed the security hereinbefore required, and shall be trustees of such estate for the benefit of the creditors of such corporation and of its stockholders.³ Such receiver shall have all the power and authority conferred by law upon trustees to whom an assignment of the estate of insolvent debtors may be made, pursuant to the provisions of the fifth chapter of the second part of the Revised Statutes.⁴ If there shall be any sum remaining due upon any share of stock subscribed in such corporation, the receivers shall imme-

¹ *Judson v. The Rossie, etc., Co.*, 481; *Bangs v. Duckenfield*, 18 N. Y. 9 Paige, 598; *Corning v. Mohawk Ins. Co.*, 11 How., 190. R., 592.

² 2 R. S., 469, § 67.

³ Laws 1852, chap. 71; 1866, chap. 403; see, also, *Re Campbell*, 13 How.,

⁴ *Id.*, § 68.

diately proceed and recover the same, unless the person so indebted shall be wholly insolvent; and for that purpose may commence and prosecute an action for the recovery of such sum, without the consent of any creditors of such corporation.¹ The receivers, immediately on their appointment, shall give notice thereof, which is to contain the same matter required by law in notices of trustees of insolvent debtors; and, in addition thereto, is to require all persons holding any open or subsisting contract of such corporation to present the same in writing, and in detail to such receivers, at the time and place in such notice specified; which shall be published for three weeks in the state papers, and in a newspaper printed in the county where the principal place of conducting the business of such corporation shall have been situated.²

13. The effect of the appointment of such receiver, is to render void all sales, assignments, transfers, mortgages, and conveyances, of any part of the estate, real or personal, including things in action, of every such corporation, made after the filing of the petition for a dissolution thereof, in payment of, or as security for, any existing or prior debt, or for any other consideration, and all judgments confessed by such corporation after that time, shall be absolutely void as against the receivers who may be appointed on such petition, and as against the creditors of such corporation.⁴

14. After the first publication of the notice of the appointment of receivers, every person, having possession of any property belonging to such corporation, and every person indebted to such corporation shall account and answer for the amount of such debt, and for

¹ 2 R. S., § 69.

² 2 R. S., 469, § 70.

³ Id., § 71; Re Waterbury, 8 Paige, 380.

the value of such property to the said receivers ; and all the provisions of law, in respect to trustees of insolvent debtors, the collection and preservation of the property of such debtors, the concealment and discovery thereof, and the means of enforcing such discovery, shall be applicable to the receiver so appointed and to the property of such corporation.¹ Such receivers shall have the same power to settle any controversy that shall arise between them and any debtors or creditors of such corporation by a reference as is given by law to trustees of insolvent debtors ; and the same proceedings for that purpose shall be had, and with the like effect, and application for the appointment of referees may be made to any officer authorized to appoint such referees on the application of trustees of insolvent debtors, who shall proceed therein in the same manner, and the referees shall proceed in like manner and file their report with like effect in all respects.²

15. The receivers shall be subject to all the duties and obligations by law imposed on trustees of insolvent debtors, so far as they may be applicable, except where other provisions shall be herein made. They shall call a general meeting of the creditors of such corporation, within four months from the time of their appointment, when all accounts and demands for and against such corporation, and all its open and subsisting contracts, shall be ascertained and adjusted so far as may be, and the amount of the moneys in the hands of the receivers declared.³ If there shall be any subsisting engagements or contracts of such corporation, which are in the nature of insurances or contingent engagements of any kind, the receivers may, with the consent of the party holding such engagement, cancel and discharge the same, by refunding

¹ 2 R. S., 469, § 72.

³ Id., § 74.

² Id., § 73.

to such party the premium or consideration paid thereon by such corporation, or so much thereof as shall be in the same proportion to the time which shall remain of any risk assumed by such engagement as the whole premium bore to the whole term of such risk, and upon such amount being paid by such receivers to the person holding or being the legal owner of such engagement, it shall be deemed canceled and discharged as against such receivers.¹ The receivers shall retain out of the moneys in their hands, a sufficient amount to pay the sums, which they are herein before authorized to pay, for the purpose of canceling and discharging any open or subsisting engagements.² If any suit be pending against the corporation, or against the receivers for any demand, the receivers may retain the proportion which would belong to such demand if established, and the necessary costs and proceedings, in their hands, to be applied according to the event of such suit, or to be distributed in a second or other dividend.³

16. The receivers shall distribute the residue of the moneys in their hands, among all those who shall have exhibited their claims as creditors, and whose debts shall have been ascertained, as follows: 1. All debts entitled to preference under the laws of the United States. 2. Judgments actually obtained against such corporation, to the extent of the value of the real estate on which they shall respectively be liens. 3. All other creditors of such corporation, in proportion to their respective demands, without giving any preference to debts due on specialties.⁴

17. If the whole of the estate of such corporation be not distributed on the first dividend, the receivers shall within one year thereafter, and within sixteen months

¹ 2 R. S., 470, § 75; Re Croton Ins. Co., 3 Barb. Ch., 642.

² Id., § 77.

³ Id., § 78.

⁴ Id., § 79.

after their appointment, make a second dividend, of all the moneys in their hands among the creditors entitled thereto; of which, and that the same will be a final dividend, three weeks' notice shall be inserted once in each week, in the state paper, and in a newspaper printed in the county where the principal place of business of such corporation was situated.¹ Such second dividend shall be made in all respects in the same manner as herein prescribed, in relation to the first dividend, and no other shall be made thereafter among the creditors of such corporation, except to the creditors having suits against it or against the receivers, pending at the time of such second dividend, and except of the moneys which may be retained to pay such creditors as herein provided; but every creditor, who shall have neglected to exhibit his demand before the first dividend, and who shall deliver his account to the receivers before such second dividend, shall receive the sum he would have been entitled to on the first dividend, before any distribution be made to the other creditors.²

18. After such second dividend shall have been made, the receivers shall not be answerable to any creditor of such corporation, or to any person having claims against such corporation, by virtue of any open and subsisting engagement, unless the demands of such creditor shall have been exhibited and the engagements upon which such claims are founded, shall have been presented to the said receivers, in detail and in writing, before or at the time specified by them in their notice of a second dividend.³ If, after the second dividend is made, there shall remain any surplus in the hands of the receivers, they shall distribute the same among the stockholders of

¹ 2 R. S., 470, § 80.

³ Id., § 82.

² Id., § 81.

such corporation, in proportion to the respective amounts paid in by them, severally on their shares of stock.¹ When any suit pending, at the time of the second dividend shall be terminated, they shall apply the moneys retained in their hands for that purpose, to the payment of the amount recovered, and their necessary charges and expenses; and if nothing shall have been recovered, they shall distribute such moneys, after deducting their expenses and costs, among the creditors and stockholders of the corporation, and in the same manner as herein directed in respect to a second dividend.²

19. The receivers shall be subject to the control of the supreme court, and may be compelled to account at any time; they may be removed by the court, and any vacancy created by such removal, by death or otherwise, may be supplied by the court.³

20. Within three months after the time herein prescribed for making a second dividend, the receivers shall render a full and accurate account of all their proceedings to the supreme court, on oath, which shall be referred to a referee to examine and report thereon.⁴ Previous to rendering such account, the receivers shall insert a notice of their intention to present the same, once in each week, for three weeks, in the state paper, and in a newspaper of the county, in which notices of the dividends are herein required to be inserted, specifying the time and place at which such account will be rendered.⁵ The referee to whom such account shall be referred, shall hear and examine the proofs, vouchers and documents offered for or against such account, and shall report thereon fully to the court.⁶

21. Upon coming in of such report, the court shall hear

¹ 2 R. S., 471, § 83.

² Id., § 84.

³ Id., § 85.

⁴ Id., § 86.

⁵ Id., § 87.

⁶ Id., § 88.

the allegations of all concerned therein, and shall allow or disallow such account, and decree the same to be final and conclusive upon all the creditors of such corporation, upon all persons who have claims against it, upon any open or subsisting engagement, and upon all the stockholders of such corporation. Such receivers shall also account, from time to time, in the same manner, and with the like effect, for all moneys which shall come to their hands after the rendering of such account, and for all moneys which shall have been retained by them for any of the purposes hereinbefore specified, and shall pay into court all unclaimed dividends.¹ The order upon any such accounting may be appealed from the same as other orders of the court.²

22. It shall be lawful for receivers of the property and effects of banking corporations, from time to time, to make dividends of the moneys in their hands among the creditors of such corporation, until the payment of such creditors in full; and no dividends shall be made to the stockholders of such corporations until after the final dividends to the creditors.³

23. Such receiver shall be subject to the direction and control of the supreme court, as to the time of making dividends, both to the creditors and stockholders of such corporations, and as to the time of closing up the concerns of such corporations, and rendering their final account.⁴

24. Whenever the receiver of any insolvent corporation, or joint stock associations for banking purposes, has been removed, and has neglected, for the period of sixty days after the appointment of his successor, to pay to such successor the moneys remaining in his hands, or any part thereof, then, and in that case, such successor may

¹ 2 R. S., 472, § 89.

² Id., § 90; Laws 1854, p. 592.

³ Laws 1844, chap. 239, § 1.

⁴ Id., § 2.

bring and maintain an action, in any court of competent jurisdiction, for the moneys so neglected to be paid over, or any part thereof, against the receiver so removed and his surety or sureties, on the bond given by such receiver so removed for the performance of his duty as such receiver.¹

25. The receiver stands as a representative and trustee both of the creditors and of the corporation.² He is bound by all the legal acts and transfers of such corporation; but not by those that are illegal.³ It is his duty to require the solvent stockholders to pay up the balance due from them on their stock;⁴ and the rule is the same whether the stock be held by the original stockholders or by assignees.⁵ A resolution of the company that there shall be no further call on shares will be void as against a receiver appointed after its insolvency.⁶ Should the receiver bring an action against the shareholder to compel him to pay up his share, the defendant therein cannot question the regularity or propriety of the receiver's appointment.⁷

26. It will be observed that the provisions of the statute contemplate an equal distribution among all the creditors, without reference to the time in which their respective debts accrued, although the creditor upon whose application the receiver may have been appointed, has actually proceeded to judgment and execution against the company.⁸ To entitle a creditor to a preference in payment over another, he must have obtained a specific appropriation or an equitable lien upon the same particular part of the fund.⁹

¹ Lawe 1866, chap. 26.

² *Gillett v. Moody*, 3 Comst., 479; *Tallmadge v. Pell*, 3 Seld., 328.

³ *Hyde v. Lynde*, 4 Comst., 387; *Brouwer v. Harbeck*, 1 Duer, 114.

⁴ *Pentz v. Hawley*, 1 Barb. Ch., 122.

⁵ *Mann v. Currie*, 2 Barb., 294.

⁶ *Sagory v. Dubois*, 3 Sandf. Ch., 466.

⁷ *Id.*

⁸ *Lowene v. American Fire Ins. Co.*, 6 Paige, 482.

⁹ *De Peyster v. American Fire Ins. Co.*, 6 Paige, 486.

27. Should the corporation pay the claim and costs of the petitioning creditor, the court may order the proceedings to be discontinued, and the receiver to be discharged, provided there is no other creditor that has sought to avail himself of the benefit of the proceedings.¹

28. The statute also provides that the supreme court shall have jurisdiction over directors, managers and other trustees and officers of corporations : 1st, To compel them to account for their official conduct in the management and disposition of the funds and property committed to their charge ; 2d, To decree and compel payment by them to the corporation whom they represent, and to its creditors, of all sums of money, and of the value of all property which they may have acquired to themselves or transferred to others, or may have lost or wasted by any violation of their duties as such trustees ; 3d, To suspend any such trustee or officer from exercising his office, whenever it shall appear that he has abused his trust ; 4th, To remove any such trustee or officer from his office, upon proof or conviction of gross misconduct ; 5th, To direct new elections to be held by the body or board duly authorized for that purpose, to supply vacancies created by such removal ; 6th, In case there be no such body or board, or all the members of such board be removed, then to report the same to the governor, who shall be authorized, with the consent of the senate to fill such vacancies ; 7th, To set aside all alienations of property made by the trustees or other officers of any corporation, contrary to the provisions of law, or for purposes foreign to the lawful business and objects of such corporation, in cases where the person receiving such alienation knew the purpose for which the same was made ; and 8th, To restrain and prevent any such alienation in

¹ Angell v. Silsbury, 19 How., 48.

cases where it may be threatened, or there may be good reason to apprehend it will be made.¹

29. The jurisdiction conferred by the statute cited above shall be exercised as in ordinary cases, on bill or petition as the case may require, or the supreme court may direct, at the instance of the attorney general, prosecuting in behalf of the people of this state, or at the instance of any creditor of such corporation, or at the instance of any director, trustee, or other officer of such corporation having a general superintendence of its concerns.²

30. The visitorial powers above conferred can only be exercised by the supreme court on the application of the attorney general prosecuting in behalf of the people of this state, or at the instance of a creditor or of a director, trustee or other officer having a general superintendence of the corporate concerns. Therefore a stockholder, or any trustee or officer not having such general superintendence, cannot maintain an action under this section, to have the corporation dissolved, and for the appointment of a receiver. Nor can the court in such case entertain such action or grant such relief under its general powers as a court of equity.³

31. Whenever any incorporated company shall have remained insolvent for one whole year, or for one year shall have neglected or refused to pay and discharge its notes or other evidences of debt, or for one year shall have suspended the ordinary and lawful business of such corporation, it shall be deemed to have surrendered the rights, privileges, and franchises granted by any act of incorporation, or acquired under the laws of the state, and shall be adjudged to be dissolved.⁴

32. A suspension of business for more than a year,

¹ 2 R. S., 462, § 33.

² Id., § 35.

³ *Howe v. Dewel*, 43 Barb., 504.

⁴ 2 R. S., 463, § 38.

under a formal resolution to that effect, by the board of directors, is a forfeiture of its charter under the above provision, although the company in the mean time had attended to the adjustment of losses upon risks previously assumed and to collecting in and securing the corporate funds.¹ So, where a manufacturing corporation leased its works for two years and a half, it was held to amount to a suspension of its ordinary business for more than a year, although the business was conducted as usual by the lessee.²

33. Whenever the directors, trustees, or other officers having the management of the concerns of any corporation, or the majority of them shall discover that the stock, property and effects of the corporation have been so far reduced by losses or otherwise, that it will not be able to pay all just demands to which it may be liable, or to afford a reasonable security to those who may deal with such corporation, or whenever such directors, trustees or officers, or a majority of them shall, for any reason, deem it beneficial to the interest of the stockholders that the corporation should be dissolved, they may apply to the supreme court by petition, for a decree dissolving such corporation, pursuant to the provisions of the statute.³ This does not extend or apply to an incorporated library society, religious corporation, or to any select school or academy incorporated by the regents of the university, or by the legislature.⁴

34. The petition will be referred to a referee, to hear the allegations and proofs of the parties, and take testimony in relation thereto; and he is with all convenient speed to report the same to the court with a statement of the property, effects, debts, credits and engagements of

¹ Ward v. Sea Ins. Co., 7 Paige, 294.

² Conro v. Port Henry Iron Co., 12 Barb., 27.

³ 2 R. S., 467, § 58.

⁴ Id., 472, § 91.

such corporation and of all other matters and things pertaining to the affairs of such corporation. Upon the coming in of the report, if it shall appear to the court that such corporation is insolvent, or that for any other reason, a dissolution thereof will be beneficial to the stockholders, and not injurious to the public interest, a decree is to be entered dissolving the corporation and appointing one or more receivers of its estate and effects; and such corporation will, thereupon, be dissolved and cease to exist.¹

35. Any of the directors, trustees, or other officers of such corporation, or any of its stockholders, may be appointed receivers; but before they enter upon the duties of their appointment, they will have to give security to the people of the state in such penalty as the court shall direct, conditioned for the faithful discharge of the duties of their appointment, and for the due accounting for all moneys received by them. Such receivers will be vested with all the estate, real and personal, of such corporation, from the time of their having filed their security, and be trustees of such estate for the benefit of the creditors of such corporation, and of its stockholders. And they will have all the power and authority conferred by law upon trustees to whom an assignment of the estate of insolvent debtors may be made.²

36. The general powers and duties of receivers under the above provisions relating to a voluntary dissolution of a corporation, are indetical, in all respects, with the powers and duties of receivers on proceedings by judgment creditors as given in the former part of this section.³

37. Whenever any corporation having banking powers or having the power to make loans on pledges or

¹ 2 R. S., 468, § 65.

² Id., § § 66, 67, 68.

³ See Laws, 1852, chap. 71; 1860, chap. 403.

deposits, or authorized by law to make insurances, shall become insolvent or unable to pay its debts, or shall have violated any of the provisions of its act or acts of incorporation, or of any other act binding on such corporation, the supreme court may, by injunction, restrain such corporation and its officers from exercising any of its corporate rights, privileges, or franchises, and from collecting or receiving any debts or demands, and from paying out, or in any way transferring or delivering to any person any of the moneys, property or effects of such corporation, until the court shall otherwise order.¹

38. Upon such application being made, and in any stage of the proceedings thereupon, the court may appoint one or more receivers to take charge of the property and effects of such corporation, and to collect, sue for and recover the debts and demands that may be due, and the property that may belong to such corporation, who shall in all respects be subject to the control of the court.² The powers and duties of receivers herein are the same as are the powers and duties of receivers appointed in case of the voluntary dissolution of a corporation.³ What those powers and duties are has been stated at large in the former part of this section.

39. It is also the duty of the receiver to keep an account of all moneys received by him, and on the first days of January, April, July and October, in each and every year, to make and file a written statement, verified by his oath that such statement is correct and true, showing the amount of money received by the receiver, his agents, or attorneys, the amount he has a right to retain under the provisions of the statute and the items for which he claims to retain the same, and the distributive share due each

¹ 2 R. S., 463, § 39.

³ Id., § 42.

² Id., § 41.

person interested therein. He is required, also, to pay such distributive share to the person or persons, entitled thereto, on demand at any time after such statement. Such account, statement, and all the books and papers of the corporation in the hands of the receiver, shall at all reasonable times be open for the inspection of all persons having an interest therein. And, in case of neglect or refusal to comply with either of the above requirements, or any duty imposed upon him by the statute, the supreme court, at either a general or special term, shall, on the application of the party aggrieved, unless such neglect or refusal shall be satisfactorily explained to the court, forthwith remove such receiver, and appoint some suitable person as receiver in his place. Such removal shall not vitiate or annul any legal proceedings had by such receiver; but such proceedings shall be continued by such successor as if no removal had been made. Such receiver shall also be liable to pay to the party interested, interest at the rate of ten per cent per annum, on all moneys due to such party and retained by him more than one day after such demand made as aforesaid.¹

40. In case the corporation in regard to which the receiver is appointed, is a mutual insurance company, such receiver has full power under the authority and sanction of the court appointing him, to make all such assessments on the premium notes belonging to the corporation as may be necessary to pay the debts of the corporation, as by the charter thereof the directors of the corporation have authority to make; and the notice of such assessment may be given in the same manner as is provided in the charter of the company for the directors of the company to give; and the receiver shall have the like rights and remedies upon and in consequence of the

¹ 2 R. S., 464, § 42; as amended, Laws 1858, p. 592.

nonpayment of the assessment as are given to the corporation or the directors thereof by the charter of the corporation.¹ The receiver in mutual insurance cases may receive a voluntary surrender of all policies issued by the corporation, or may cancel the policies issued by the corporation, in all cases where by the charter of the corporation the directors thereof are authorized to receive the surrender of, or to cancel the policies issued by the corporation.²

41. Upon a proper action instituted for that purpose by the receiver, the court appointing the receiver, may examine by a reference or otherwise, into the proceedings and acts of the corporation ; and if it shall appear upon such examination, that the directors or officers of the corporation, or either, or any of them, have in any manner misapplied, or improperly disposed of the fund, property, or effects of the corporation, the court may decree that the directors or officers of the corporation that have been guilty of the misapplication or improper disposition of such funds, property, and effects, pay the same to such receiver, and may enforce such decree by such process as may be necessary to accomplish that object.³

42. In respect to mutual insurance companies it is further provided that the receiver, in case of a controversy in the settlement of any demand or claim against any member or stockholder of the company or other person may consent to a reference of such controversy.⁴

43. The receiver or receivers of any savings bank or institution for savings, now or hereafter appointed in pursuance of section forty-one of title four of chapter eight of the third part of the Revised Statutes, shall, after having

¹Laws 1852, p. 67 ; *Bangs v. Duckinfield*, 18 N. Y. R., 592.

²Laws of 1852, p. 67, § 3.

³*Id.*, § 4.

⁴See Laws 1862, p. 743.

complied with all the provisions of said title from the section aforesaid to and including section seventy-eight of said title, distribute the residue of the moneys in their hands among all the creditors of said savings bank or institution for savings whose debts shall have been ascertained from an examination of the books of account which shall have been kept by such savings bank, or institution for savings or otherwise in the order prescribed by section seventy-nine of said title, whether such creditors shall then have exhibited their claim or not.¹

44. Receivers of the property within this state of foreign or other corporations, shall be allowed such commissions as may be fixed by the court appointing them, not exceeding five per cent on the amount received and disbursed by them.² But the revised statutes provide that receivers of moneyed corporations are entitled to the same commissions and compensation for their services as are now allowed by law to executors and administrators.³ And also that receivers of a corporation seeking a voluntary dissolution, are entitled, in addition to their actual disbursements, to such commissions as the court shall allow, not exceeding the sum allowed by law to executors or administrators.⁴ The compensation of executors and administrators is as follows; For receiving and paying out all sums of money, not exceeding one thousand dollars, at the rate of five per cent. For receiving and paying out any sums exceeding one thousand dollars and not amounting to ten thousand dollars, two and a half per cent. For all sums above ten thousand dollars, one per cent.⁵ (For forms herein, see No. 133).

¹ Laws 1855, chap. 336, p. 612.

² Code, § 244, sub 4, as amended, 1867.

³ Laws 1842, p. 4.

⁴ 2 R. S., 469, § 76.

⁵ § 58, art. 3, tit. 3, chap. 6, part 2, R. S.; as amended, 1863, chap. 362, § 8.

SECTION VIII.

OTHER PROVISIONAL REMEDIES. DEPOSIT OF MONEY, ETC., IN COURT.

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| <ol style="list-style-type: none">1. Deposit of money, etc., in court.2. Similar to the old practice.3. In what cases order granted.4. In actions against executors and administrators.5. What property contemplated. | <ol style="list-style-type: none">6. Motion, by whom made, on what papers, and to what court.7. Order what to contain, and how served.8. Property, etc., how deposited.9. Disobedience, how punished. |
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1. "When it is admitted by the pleading or examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court. "Whenever, in the exercise of its authority, a court shall have ordered the deposit, delivery, or conveyance of money, or other property, and the order is disobeyed, the court, besides punishing the disobedience, as for contempt, may make an order, requiring the sheriff to take the money or property and deposit, deliver, or convey it, in conformity with the direction of the court."¹

2. The above provision covers the subject of payment of money into court, which was formerly an important branch of equity practice.² I have been able to find but very few decisions directly on the subject, made since the

¹ Sub 5, § 244.

² See 1 Barb. Ch. Pr., 236; 1 Hoff. Pr., 319.

Code, and shall, therefore, rely more fully on the old practice.

3. Where the defendant, by answer, clearly admitted that he had trust moneys in his hands, the court would always order it to be paid into court, upon an interlocutory application therefor,¹ without regard to any question of violation of trust, or insolvency of the trustees.² The order was also proper upon admissions appearing from the examination of the defendant before the master.³ But, as a general rule, to entitle the plaintiff to an order directing the delivery of property into court, he must show himself to be solely entitled, or to have such an interest jointly with others as to entitle him, on behalf of himself and those others, to have the fund or property secured.⁴

4. Where the defendant — an executor — admits that he has moneys of the testator in his hands, the court will order it paid into court, notwithstanding the executor alleges that he has loaned such money upon a promissory note bearing interest.⁵ So, in an action against executors or administrators for a distribution of the estate of decedent, if it clearly appear that there is money belonging to the estate in their hands uninvested, and to which such executors or administrators have no claim, the court will order it brought into court.⁶

5. The above provision of the Code undoubtedly has reference to specific property, whether money or any thing else, that can be traced or identified.⁷ Where it appeared by the pleadings that the plaintiff had deposited money which was the subject of the action with the defendant to be by him paid to a third party (the defendant being

¹Clarkson v. De Peyster, Hopk., 274; 1 Barb. Ch. Pr., 237.

²Id.

³1 Barb. Ch. Pr., 237.

⁴Freeman v. Fairlie, 3 Mer., 29.

⁵Vigrass v. Binfield, 3 Mad., 62.

⁶Hosack v. Rogers, 6 Paige, 415.

⁷Lane v. Losie, 11 How., 360.

security for the payment thereof to such third party) which money was in the defendant's possession, an order was granted that such money be paid into court or delivered to the plaintiff.¹ So, the order may be made though the defendant holds the money as agent merely, and not as trustee; as where an action was brought to recover from the defendant a sum of money which came into his hands as agent for the plaintiff; and an injunction had been granted to restrain the disposition of the fund, the defendant moved for and obtained an order allowing him to pay the money into court.²

6. The motion to pay into court may be made by either party,³ and should be addressed to the court, at special term, on the usual notice of eight days, or order to show cause. It is based on the pleadings, or pleadings and examination, or other proceedings in the cause, showing the *admission* of the defendant.

7. The order should clearly direct what disposition is to be made of the money or other property, whether it is to be paid into court or to be delivered to the plaintiff, and, in the latter case, whether the plaintiff is to give security or not, and as to the amount, etc. It should also direct within what time the delivery or deposit is to be made. The order is to be entered and served the same as other orders, but it must be served personally on the defendant to bring him into contempt. (See form No. 134).

8. The property or thing directed to be brought into court is to be deposited with the clerk of the county where the action is triable.⁴ If, however, it be money, it must be paid to the county treasurer of the county in which the action is triable, pursuant to the directions of the 81st rule of the court.

¹ *Burhans v. Casey*, 4 Sandf., 706.

³ *Id.*

² *Merritt v. Thompson*, 1 Abb., 223; 10 How., 428.

⁴ 1 Van Sant. Eq. Pr., 271.

9. Should the defendant disobey the order, the plaintiff should move, upon proof of such disobedience, and on due notice of motion, for an attachment against him as for a contempt. Or he may obtain and serve an order to show cause why he should not be punished for the contempt. And, in addition to that, the court may make an order requiring the sheriff to take the money or property, and deposit, deliver or convey it in conformity with the directions of the court.

SECTION IX.

SATISFACTION OF PART OF CLAIM ADMITTED DUE.

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| 1. Satisfaction of part of claim admitted due. | 6. Motion, where and how made. |
| 2. When order will be granted. | 7. Order, how made and entered. |
| 3. Miscellaneous cases. | 8. How served. |
| 4. Cases where the order was denied. | 9. Where order is not obeyed. |
| 5. Where plaintiff's claim is single and entire. | 10. Order, how enforced. |
| | 11. Order, when appealable. |

1. "When the answer of the defendant *expressly, or by not denying*, admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a *judgment or provisional remedy*." ¹ The words in italics were inserted by the amendment of 1857.

2. This power to order payment of an admitted part of a claim pending suit as to the balance, is of long usage in courts exercising equity jurisdiction.² The motion is addressed to the discretion of the court, and should only be granted in a clear case.³ The admission should be distinct and unequivocal of a definite sum being due, or such facts should be admitted as necessarily amount to such an admission; and it must be an admission of *part* only of the plaintiff's claim, where the *whole* claim is admitted, there should be a judgment.⁴ It was the former practice, and is, no doubt, true now, that an application to pay money into court, or to a party before final decree, or, at least, before a report of a master, must be founded

¹ Last clause of sub 5, § 244.

² Clarkson v. De Peyster, Hopk., 274.

³ Russell v. Meacham, 16 How., 193, per Harris, J.

⁴ Slauson v. Conkey, 10 How., 57.

upon a full and explicit admission in the answer, or examination of the defendant, of a sum being due. The court will not investigate the case to decide whether it is so.¹ A plea of tender is an unequivocal admission of the justice of the plaintiff's claim to the extent of the sum admitted.² So, where an admission is made by way of an offer of judgment, the sum so offered may be ordered paid under this provision.³

3. Where a surviving partner, sued by the administrator of the deceased partner for an accounting, admits a balance in his hands due to such partner's estate, but alleges that there are outstanding claims against the firm, and that the firm has claims to enforce which will require time and disbursements, he may be ordered to pay over such balance, less the contested claims against the decedent on the administrators giving security to pay the decedent's proportion of the claims against the estate, and of the costs and expenses.⁴ So, where a fund in litigation has been brought into court, and the answer of the defendant admits a part of it to be due to the plaintiff, but disputes his claim to the residue, the court may order the sum admitted to be due to be paid over to the plaintiff, without prejudice to his further claims.⁵ So where, in an action on contract, the defendant makes an offer pursuant to section 385, which is not accepted, he may be ordered to pay the plaintiff the amount of such offer.⁶

4. But the order was refused where the answer traversed the plaintiff's claim as stated, and then stated that the work to recover the value of which the action was brought, was not worth more than a certain sum, less

¹ *Coursen v. Hamlin*, 2 Duer, 513.

² *Roosevelt v. N. Y. & Harlem R. Co.*, 30 How., 226.

³ *Id.*

⁴ *Roberts v. Law*, 4 Sandf., 642.

⁵ *Merritt v. Thompson*, 3 E. D. Smith, 599; 10 How., 428; 1 Abb., 223.

⁶ *Dusenbury v. Woodward*, 1 Abb., 443.

than the amount claimed.¹ Also, where the defendants admitted that they had the fund the plaintiff sought to have paid over to him, but that they were ignorant whether it belonged to him or to a third party who claimed it, and asked leave to pay the money into court.² So, where the plaintiff, on a sale of a bill of goods on a credit of six months, claimed that the sale was *conditional*; that the title, although the goods were received by defendant, did not pass from them in consequence of the conditions not having been complied with, and alleged that the defendant had wrongfully converted such goods to his own use, and claimed damages to the amount of the goods by reason thereof; and the answer of the defendant admitted the purchase, amount, and receipt of the goods, but denied the conditional purchase and the conversion of the plaintiff's goods to his own use, it was held that the provisional order obtained by the plaintiff, directing the defendant to pay and satisfy the amount of the plaintiff's claim admitted in the answer to be due, was improvidently granted. The defendant admitted the *whole* claim and a judgment would have been proper, but to justify the order herein, only *part* of the claim must be admitted.³

5. The court may authorize a defendant to satisfy a part of a plaintiff's claim as well where the plaintiff's cause of action, as set up, is single and entire and the answer admits a part thereof to be just, as where the complaint alleges more than one cause of action, and more than one item of claim, one of which is admitted to the precise extent set up by the plaintiff.⁴ And it is no reason that this order should be refused, that the defend-

¹ Dolan v. Petty, 4 Sandf., 673.

² Bender v. Sherwood, 15 How., 258.

³ Slauson v. Conkey, 10 How., 57; see same case, 1 Abb., 228.

⁴ Quintard v. Secor, 3 Sandf., 614; Guiet v. Murphy, 18 How., 411; see an *obiter dictum*, otherwise, in Russell v. Meacham, 16 How., 193.

ant has made a previous offer to pay the sum to the plaintiff, in full satisfaction of his claim.¹

6. The motion is to be made to the court at special term, on the usual notice of eight days to the defendant, or on an order to show cause. It is based on the pleadings alone, and, therefore, no papers need be served with the notice.

7. The order is allowed, certified and entered the same as other orders. It should direct the specific sum of money to be paid, or describe, with reasonable certainty, the particular act or thing to be done, and should limit or specify the time within which the money is to be paid, or the act performed.² (See form No. 136).

8. If it is desired to bring the party into contempt for a disobedience of the order, a copy, certified by the clerk, must be served upon him personally, as well as on his attorney, but otherwise a service on the attorney will be sufficient.

9. If the money be not paid or the act performed within the time limited by the order, the plaintiff may apply to the court on an affidavit of that fact, and on the order, for an attachment to punish the party as for a contempt. The defendant should have notice of the motion. In such cases where the court will not enforce the order by attachment, the party should enter judgment on the order, usually with the costs of the motion, and enforce the same by execution. The entry of judgment will be similar to the case of a judgment upon a frivolous answer, and the judgment roll will consist of the summons, pleadings, order and judgment.³

10. The court may enforce the order as "it enforces a judgment or provisional remedy," that is, by execution or

¹ *Merritt v. Thompson*, 3 E. D. Smith, 599; 10 How., 428.

² 1 *Van Sant*, Eq. Pr., 239.

³ *Id.*

by an attachment, as for a contempt. Where the action is on contract for the payment of money only, the court will usually order the amount admitted to be due, to be satisfied by judgment.¹ It will enforce the order by attachment only in those cases where the defendant upon final judgment in the same action would be liable to imprisonment.² Previous to the amendment of 1857, by which the word "judgment," was inserted before "provisional remedy," it was doubted whether or not in all cases where the defendant admitted part of the plaintiff's claim, the court might not enforce obedience to the order by attachment;³ but since such amendment the practice is as stated above.

11. An order directing the payment of money admitted to be due by the answer is an appealable order, but where no right of the defendant, and no rule of law has been violated, it seems the discretion of the court, as to the terms or conditions upon which such order should be granted, will not be reviewed.⁴

¹ Russell v. Meacham, 16 How., 193; Duncan v. Ainslie, 26 Barb., 199.

² Id.

³ See Meyers v. Trimble, 1 Abb., 399; Quintard v. Secor, 1 Abb., 398.

⁴ Merritt v. Thompson, 1 Abb., 223; 10 How., 428.

CHAPTER VI.

WRIT OF NE EXEAT.

- | | |
|---|---|
| 1. <i>Ne exeat</i> , not abolished by the Code. | 11. When notice of application to be given. |
| 2. Nature of the remedy. | 12. By whom granted. |
| 3. Upon what demands. | 13. Form of. |
| 4. For an account; to prevent a failure of justice. | 14. Manner of application and allowance. |
| 5. When not allowed. | 15. How executed. |
| 6. Debt must be due; against whom. | 16. Sheriff to take bond. |
| 7. Complaint need not be filed. | 17. Motion to discharge upon security. |
| 8. At what stage of the action. | 18. Discharge for cause. |
| 9. The affidavit, what to contain. | 19. When giving security waives irregularities. |
| 10. Affidavit, by whom made. | |

1. The superior court of New York have decided that the writ of *ne exeat* was abolished by section 178 of the Code;¹ while the supreme court of the state have uniformly decided otherwise, and held that it is an existing remedy.² It will be unnecessary here to give the arguments on the one side or the other. It is sufficient for our purpose to know that the supreme court still acknowledge its existence in cases of equitable cognizance.

2. The writ of *ne exeat* is a process to prevent a person's leaving the state. Although originally a prerogative writ, it is now as much a writ of right as any other process used in the administration of justice.³ It is resorted to for the purpose of obtaining equitable bail, and its object and

¹ Fuller v. Emeric, 2 Sandf., 626; Johnston v. Johnston, 16 Abb., 43; 25 How., 181.

² Forrest v. Forrest 5 How., 125; 10 Barb., 48; Bushnell v. Bushnell, 7 How., 393; Aff'd 15 Barb., 399; see also Glenton v. Clover, 10 Abb.,

422; Neville v. Neville, 22 How., 500; Rogers v. Mich. So. R. R., 28 Barb., 539; see 3 R. S. (5th ed.), 334; Laws 1854, chap. 96, § 12.

³ Gilbert v. Colt, Hopk., 496; Mitchell v. Bunch, 2 Paige, 606.

design is to hold a party amenable to justice, and to render him personally responsible for the performance of the orders and decrees of the court by preventing him from withdrawing himself from its jurisdiction.¹ It seems to be the deduction of one author, drawn from the above decisions, that, under the Code, the writ of *ne exeat* exists only as a *prerogative* writ, to compel the performance of some act, to compel which the ordinary process of execution would be insufficient, or the giving of adequate security by the defendant for that performance before he will be allowed to leave the state.²

3. As a general rule, a *ne exeat* is allowed only upon an equitable demand.³ But in case of an action for an account, or for alimony, it may be granted.⁴ It may be granted upon a bill filed by a wife against her husband, for alimony, previous to the decree.⁵ It is remarked by Chancellor Kent in *Porter v. Spencer*,⁶ "that since the time of Lord Eldon it has become settled in the English chancery that though the plaintiff may sue at law for the balance of an account and hold the party to bail, yet, as chancery holds a concurrent jurisdiction upon the head of account, the plaintiff may have the *ne exeat* on a positive affidavit of a threat or purpose of going abroad, even though the defendant's general residence was abroad."

4. In the case last cited, the bill was for an account and a *ne exeat*, and stated that the plaintiffs were merchant tailors, that they had sold clothing to the defendant on a credit of six months, that on the 1st of January then past there was a balance of account due them from the defendant with interest of \$317. To recover which sum the plaintiff had brought an action at law and held the defend-

¹ Gleason v. Bisby, Clark, 551.

² See 1 Whit. Pr., 400.

³ Mitchell v. Bunch, 2 Paige, 606;
Seymour v. Hazard, 1 John. Ch., 1.

⁴ 1 Barb. Ch. Pr., 652.

⁵ Denton v. Denton, 1 John. Ch.,
264; Forrest v. Forrest, and Bushnell
v. Bushnell, supra.

⁶ 1 John. Ch., 169.

ant to bail, and that the defendant had pleaded the general issue merely for delay. It was further alleged that the defendant's father was bail, and that he was selling his property and was about to remove permanently from the state; and also that the defendant was to go with his father, not leaving any property behind. The writ of *ne exeat* was allowed. Chancellor Kent said, among other things, "In the present case, I have some doubts whether the bill states matter of account on which the jurisdiction of the court can attach. To sustain a bill for an account there must be *mutual demands*, and not merely payments by way of set off. A single matter cannot be the subject of an account. There must be a series of transactions on one side and of payments on the other. I place my interference on the necessity of the case. From the facts charged and sworn to, it appears to me that the remedy in the suit pending at law would be absolutely defeated without the interposition of this court. The books assume and admit principles that will justify the allowance of the writ under the peculiar circumstances of the present case. The remedy sought is indispensable to prevent a failure of justice, and this creates a marked difference between this and the ordinary cases. I should think it would reflect discredit on the administration of justice, if the plaintiff could find no relief from the impending mischief arising from a failure of the remedy at law, by the immediate removal of the defendant and his bail. I have no option or discretion to refuse the writ when a case is brought within the established rules of the court." And again, in the same case, the learned judge remarked, referring to the case of *Brunker*, 3 P. Wm's, 312., "The import of this case is that the rule against the allowance of the writ, where the matter was of legal cognizance, was not then understood to be inflexible, but would be made

to yield to cases of necessity, when justice would be defeated without the aid of the writ."

5. The writ of *ne exeat* will not be allowed in an action for specific performances, unless the act to be compelled is the payment of money due.¹ Nor where the defendant might be held to bail at law, except in an action for an accounting.² Nor against a non-resident coming into the state as a witness;³ Nor where the defendant is an executor or administrator not shown to have assets in his hands.⁴

6. The debt must be due,⁵ or so far matured that present payment or performance can rightfully be demanded, and therefore the writ cannot issue to protect an accruing debt or contingent claim.⁶ The demand must also be satisfactorily ascertained, a mere declaration of belief of the existence and amount of his claim is not sufficient.⁷ It may be issued on a creditor's bill to reach equitable assets,⁸ or against the citizen of another state, or country on demands arising abroad,⁹ or against a foreign executor or administrator for an account,¹⁰ or in a proper case against a married woman.¹¹

7. It was formerly necessary to file a bill or complaint before the writ could be granted, but this is no longer necessary. It will be proper if the writ is issued and served with the summons in the ordinary manner of issuing and serving an injunction.¹²

8. It may be granted at any stage of the suit, either upon commencing the action or before judgment or

¹ Cowdin v. Cram, 3 Edw. Ch., 231; see, however, Gleason v. Bisby, Clark, 551.

² Seymour v. Hazard, 1 John. Ch., 1; Porter v. Spencer, 2 John. Ch., 169.

³ Dixon v. Ely, 4 Edw., 557.

⁴ Smedbergh v. Mark, 6 John. Ch., 138.

⁵ Seymour v. Hazard, *supra*.

⁶ Gleason v. Bisby, Clark, 551; De

Rivafinoli v. Corsetti, 4 Paige, 264; Brown v. Haff, 5 Paige, 235.

⁷ Mattock v. Tremain, 3 John. Ch., 75.

⁸ Ellingwood v. Stevenson, 4 Sandf. Ch., 366.

⁹ Woodward v. Schatzell, 3 John. Ch., 412.

¹⁰ McNamara v. Dwyer, 7 Paige, 239.

¹¹ Neville v. Neville, 22 How., 500.

¹² Bushnell v. Bushnell, 7 How., 389.

decree, or after decree.¹ It may be allowed upon a claim for alimony before any decree for alimony has been granted.²

9. The application is usually founded on affidavits. In such affidavits the *facts* on which the plaintiff relies must be set forth. They must state positively the existence of the debt, except in matters of account where the affidavit must be positive as to the existence of the *debt*, though the *amount* may be on belief.³ If the claim is against an administrator, the party should also swear to his belief of assets come to the defendant's hands.⁴ There must also be a positive affidavit of a threat or purpose to leave the state, or of such circumstances as authorize the inference that the defendant intends to go abroad.⁵ It will be sufficient if his declaration of such intention is sworn to on information from members of his family.⁶ It must be stated also that the debt will be endangered by the defendant's going abroad.⁷ But it need not be shown that he is going *immediately*, nor for the purpose of avoiding the debt.⁸ The affidavit should mention the facts on which the debt arises and on which it is grounded.⁹ (See form No. 136).

10. The plaintiff should make the affidavit as to the debt, amount, circumstances, etc.;¹⁰ but the affidavit as to the intent to go abroad may be made by third persons. And if the information of defendant's intended departure come from one who, if applied to, to make affidavit of the fact, would be likely to inform defendant of the intended

¹ Bushnell v. Bushnell, 7 How., 389; Dunham v. Jackson, 1 Paige, 629.

² Denton v. Denton, 1 John. Ch., 441; Forrest v. Forrest, 10 Barb., 54; 5 How., 125.

³ Thorne v. Halsey, 7 John. Ch., 189; Gibert v. Colt, Hopk., 500.

⁴ Smeaburg v. Mark, 6 John. Ch.,

138; McNamara v. Dwyer, 7 Paige, 239.

⁵ Mattock v. Tremain, 3 John. Ch., 75; Bushnell v. Bushnell, supra.

⁶ 1 Barb. Ch. Pr., 650.

⁷ Mattocks v. Tremain, supra.

⁸ 1 Barb. Ch. Pr., 650.

⁹ Anon., 2 Ves. Sen., 489.

¹⁰ Stewart v. Graham, 19 Ves., 312.

application for the writ, that will be a sufficient reason for not producing his affidavit.¹

11. The writ may be granted without notice to the defendant, if he have not appeared in the action; but after his appearance, he must have notice. Such was the old chancery rule, and it is probably the same now.² Where notice is required, it must be the usual notice of eight days, unless an order to show cause is obtained.

12. *Ne exeat* were formerly allowed by the same officers who were authorized to allow injunctions.³ The same practice is probably correct now, so that the writ may be granted either by the court or a judge thereof at chambers, or by a county judge in cases in which he may grant an injunction. The granting of this writ is in the discretion of the court, and is granted with much caution.⁴

13. It is not necessary, though usual, that a *ne exeat* should be by writ; it may be by order, and enforced by attachment for contempt.⁵ In order to avoid all difficulty under the Code, it is thought in one case to be advisable to have it in the form of an order.⁶ When it is by writ, it should be under the seal of the court,⁷ and the grounds on which it issues should be stated in the body of it.⁸ (See forms Nos. 137 to 139).

14. If the judge to whom the application is made is of opinion that it is a proper case for a writ of *ne exeat*, he indorses upon the affidavit or petition an allowance, as follows: "Let a writ of *ne exeat* issue in this cause against the defendant, C D, and let such writ be marked in the sum of \$1,000; and let an order to that effect be entered."⁹ An order for the writ is then drawn and entered with the

¹ 1 Barb. Ch. Pr., 650.

² Chancery Rule, 30.

³ Laws 1847, chap. 470, § 13, 1 Barb. Ch. Pr., 649.

⁴ Pratt v. Wells, 1 Barb., 425.

⁵ Bushnell v. Bushnell, 15 Barb., 405; Forrest v. Forrest, 10 Barb., 48.

⁶ Id.

⁷ 1 Van Sant. Eq. Pr., 414.

⁸ Hyde v. Whitefield, 9 Ves., 345.

⁹ 1 Barb. Ch. Pr., 650; 1 Van Sant. Eq. Pr., 414.

clerk, and the papers filed. The writ is then issued by the clerk under the seal of the court.¹ The writ must contain the sum in which the defendant is to be held to bail, and this sum should only be sufficient to cover the plaintiff's demand, and a reasonable amount of future interest; and the sheriff is not to double that sum in taking a bond.² When the *ne exeat* is in the form of an order, the application should be made in the same manner as an application for an injunction.

15. The writ must be served by the sheriff of the county in which the defendant is found. If the *ne exeat* is in the form of an order, a copy of the order and of the affidavits on which it was granted should be served with the order. So, if the *ne exeat* be by writ, it must be personally served on the defendant by delivering to and leaving with him a copy of the writ, and at the same time showing him the original under the seal of the court.

16. Upon serving the writ or order the sheriff is to take a bond to himself from the defendant, in the penal sum, designated in the writ or order, and conditioned that the defendant will not depart from, or leave the state without the permission of the court.³ The sheriff acts upon his own responsibility in executing the writ, and is the sole judge of the sufficiency of the sureties offered by the defendant.⁴ But if he take a bond, and the defendant afterward leave the state, the sheriff will be allowed a reasonable time to produce him; or to prosecute the bond and recover the amount of the sureties.⁵ An action should not be commenced upon the bond without leave of the court.⁶ If the defendant, on being arrested upon a *ne exeat*, fails to give such bail as shall be satisfactory to

¹ 1 Barb. Ch. Pr., 650; 1 Van Sant. Eq. Pr., 414.

² *Gibert v. Colt, Hopk.*, 500; *Gleason v. Bisby, Clark*, 561.

³ 1 Barb. Ch. Pr., 654.

⁴ *Brayton v. Smith*, 6 Paige, 489.

⁵ *Id.*

⁶ *Harris v. Hardy*, 3 Hill, 393.

the sheriff, he must be kept in custody, according to the command of the writ, and the sheriff must state that fact in his return to the *ne exeat*.¹ (See form No. 140).

17. After a party has been arrested upon a *ne exeat*, he may apply to the court, by motion or petition, and on notice to the plaintiff, for an order to discharge the writ. It is a matter of course to discharge a *ne exeat*, upon the defendant's giving security to answer the bill, and to render himself amenable to the process of the court to be issue pending the suit, and upon the decree. This security, if not accepted by the plaintiff, is to be approved by the judge who granted the order or writ, on notice to the plaintiff, so that he may be heard in relation to the sufficiency of the sureties.² Or if the defendant cannot find such security as will satisfy the sheriff, he may apply to the court, which will take such security as it may deem sufficient, and discharge the sheriff from liability.³

18. The defendant may move to discharge the writ, not only upon giving security as above, but for want of equity appearing upon the face of the complaint, the insufficiency of the affidavit on which the writ was granted, upon the facts set up in the defendant's answer, or affidavits, or for an irregularity of any kind in the granting or issuing of the writ. And every thing going to show that the writ ought not to have been issued, is a reason for discharging it.⁴ Affidavits may be read by either or both parties on a motion to discharge the writ. And the defendant may, in his affidavit, deny the allegation on which the writ was issued.⁵ But a mere denial of the plaintiff's affidavit will not be sufficient to obtain a discharge.⁶ Nor will it suffice to deny that the defendant was about to leave

¹ 1 Barb. Ch. Pr., 654.

² McNamara v. Dwyer, 7 Paige, 239.

⁶ Brayton v. Smith, 6 Paige, 489.

⁴ 1 Barb. Ch. Pr., 656.

⁵ Id.; Cowdin v. Cram, 3 Edw., 231; see Glenton v. Glover, 10 Abb., 422.

⁶ 1 Til. & Sher. Pr., 620, and cases.

immediately and to allege that he had given up all intentions of leaving. He must show affirmatively that he intends to remain here.¹

19. The giving to the sheriff of the usual security upon a *ne exeat* does not preclude the defendant from applying upon the complaint only, or upon the coming in of the answer, to have the writ discharged and the bond canceled. But where the defendant for his own convenience applies to the court and gives the usual bond, without asking to reserve the right of applying to cancel the bond, the right of objecting to the writ, as improvidently granted, is waived.² If defendant is in custody he should obtain leave to execute the bond without prejudice to his rights.³

¹ *Glenton v. Clover*, 10 Abb., 422. ³ *Id.*

² *Jesup v. Hill*, 7 Paige, 95.

APPENDIX OF FORMS.

CHAPTER I.

FORMS FOR ARREST AND BAIL.

No 1.

Affidavit of Injury to Person.

See ante p. 57 *et seq.*

[TITLE OF CAUSE.] *Omit title if action is not commenced.*

County of Rensselaer, ss :

A B, plaintiff in the above entitled action, being duly sworn, says, that he has a good cause of action therein against C D, the defendant, arising from the following facts, viz : * That on the fifth day of July last, at the town of Pittstown, in said county, said C D, defendant, without any cause or provocation, violently assaulted and beat this deponent, by kicking him and knocking and throwing him on the ground (*or in whatever manner the assault was committed*), whereby deponent was much bruised and injured ; and has since been seriously ill, by reason thereof, to the damage of this deponent *one thousand* dollars.

And this deponent further says, that he has commenced (or is about to commence) an action, in the supreme court, against said defendant for the recovery of said damages.

A B.

Sworn, etc.

No. 2.

Allegation of Non-Residence.

See ante p. 62.

[*Proceed as above to the * then set forth the cause of action and then allege :*] That said defendant is not a resident of this state, but resides at *Kenosha* in the state of *Wisconsin*.

No. 3.

Of Intended Departure.

See ante p. 62.

That said defendant is about to remove permanently from this state ; that he has disposed of all his property in this state ; has closed up his business, and has taken passage for himself and family on board the steamer Baltic, for Europe (as this deponent is informed by J G, brother of said defendant, and verily believes).

No. 4.

Money Received in a Fiduciary Capacity.

See ante p. 28 *et seq.*

[*As in No. 1, to the * then continue:*] That on the ninth day of July last past, this deponent delivered to C D, a note broker, doing business in the city of New York, a certain promissory note for *one hundred* dollars, made by M N, and payable to the order of this deponent. That said note was so delivered to the said C D in trust, to sell the same for cash, as a broker aforesaid, and to return the proceeds thereof, immediately to this deponent, and for no other purpose whatever. That said C D informed this deponent on the same day, that he had sold said note for ninety-five dollars cash. That said C D has neglected and refused to pay said sum of ninety-five dollars, or any part thereof, to this deponent, although requested so to do, to the damage of deponent one hundred dollars. That deponent has commenced (*etc., as in No. 1*).

A B.

Sworn, etc.

No. 5.

Money Collected by Agent.

See ante p. 25 *et seq.*

[*As in No. 1 to * then :*] That on the sixth day of January last, this deponent employed C D, the defendant, as his agent, to collect a

certain debt due this deponent of L M of Troy, in said county, that said C D was to collect the same in the name of, and for the benefit of this deponent, and was to return the proceeds thereof to him immediately upon collecting the same. That said C D has collected the whole of said debt from the said L M and received the money thereon, as will more fully appear by the affidavit of L M, hereto annexed. That this deponent did, on the first day of April last demand of said C D, that he account to him for the money so received, and pay the same over to him; but hitherto the defendant has wholly neglected and refused so to do. That this deponent has commenced, etc. (as in No. 1).

A B.

Sworn to, etc.

No. 6.*For Injury to Property.*See ante p. 16 *et seq.*

[*As in No 1 to * then continue :*] That said C D on or about the 13th day of June last wrongfully and willfully took from the possession of this deponent the following goods (*describe them*), of the value of *one hundred* dollars: That this deponent did, on the first day of July last demand of said C D, a return of said property; but that he refused to return the same, and that he has converted said goods to his own use, to this deponent's damage one hundred dollars. That this deponent has commenced, etc. (as in No 1).

No. 7.*To Recover the Possession of Personal Property.*See ante p. 36 *et seq.*

[*As in No. 1, to the * then continue :*] That on the sixth day of May last, this deponent was lawfully possessed of certain goods and chattels, then and ever since, the property of this deponent, consisting of (*here describe the property*), of the value of five hundred dollars.

That on the said sixth day of May, at Johnsonville, in said county, C D above named (*wrongfully*) took the said property from the possession of this deponent, and still wrongfully detains the same, to the damage of this deponent five hundred dollars.

And deponent further says, that he has commenced an action against said defendant, in the supreme court, to recover the possession of said property.

That on the tenth day of May last, the annexed summons was issued herein to the sheriff of the county of Rensselaer, for service; and the annexed affidavit with the requisition indorsed thereon, together with the prescribed undertaking, were delivered to him for the purpose of obtaining an immediate delivery of such property, pursuant to the provisions of the Code of Procedure. That since the commencement of said action (*or whenever it was*), said property has been removed (*or concealed, or disposed of*) by said defendant, so that it cannot be found or taken by the sheriff, as more clearly appears by his return hereto annexed; and that, as deponent believes, it has been so removed (*or concealed or disposed of*) with the intent that it should not be so found or taken (*or with the intent to deprive this plaintiff of the benefit thereof*); which belief is founded upon the following facts, namely: (State the facts showing the *intent* in detail).

A B.

Sworn, etc.

No. 8.

For Fraud in Contracting a Debt.

See ante pp. 40, 60.

[TITLE OF CAUSE.] *If action is commenced.*

County of Rensselaer, ss:

A B, the above named plaintiff, being duly sworn, says that he has commenced (or is about to commence) an action against (the above named) C D, in the supreme court, to recover a debt due this deponent from said C D, to the amount of five hundred dollars, for the following described goods, sold and delivered by this deponent, to said C D. (Here describe goods).

That the said C D was guilty of fraud in contracting the said debt.

That said debt was contracted as follows : On or about the ninth day of February last, the said C D requested this deponent to sell him the above described goods on credit ; that for the purpose of inducing this deponent to sell such goods on credit, the said C D, then and there falsely and fraudulently stated and represented to the deponent, that he, the said C D (*setting forth the exact representations*), That this deponent believed such statements to be true, and was thereby induced to, and did sell and deliver to the said C D, upon credit, the said goods, so applied for by him, and that, except for such statements and representations, this deponent would not have made such sale and delivery as aforesaid.

And this deponent further alleges that all of such statements and representations (or *a part of the same, specifying which*), were false and untrue when so made to the knowledge of the said C D, and that said C D made the same with intent to defraud this deponent by obtaining said goods upon credit, without paying for them.

(*Give detailed statement of all the facts and circumstances within deponent's knowledge going to show that the representations were false and fraudulent when made to the knowledge of defendant*).

A B.

Sworn, etc.

No. 9.

For Fraudulent Disposal of Property.

See ante pp. 51, 62.

[*As in No. 1 to * then continue :*] That on the 1st day of January, 1867, C D made and delivered to this deponent, his certain promissory note in writing, bearing date on that day, whereby for value received, he promised to pay, thirty days from date, to the order of this deponent, the sum of three hundred dollars.

That at the time of making such note, and for some time prior thereto, said C D was carrying on business in the village of Albia in said county as a grocer.

That on the day said note became due, to wit : on the third day

of February, 1867, this deponent called at the store of said C D, in the village of Albia aforesaid, and presented said note to him and demanded payment thereof. .

That said C D informed this deponent that it was not convenient for him to pay the note then, but that if he would call again in three days he would settle the matter. That at the expiration of the three days, to wit: on the sixth day of February, 1867, this deponent called again at the said store as requested, and found said store in the possession of one M N, who then stated to this deponent that on the preceding day the said C D had sold the store and all the goods therein to said M N for which M N had paid him four hundred dollars; and said M N exhibited to this deponent a bill of sale thereof, executed by said C D.

That said C D was not present at said store, and, as this deponent is informed and believes, has not been present thereat since said sale, and that this deponent has made diligent search for said C D at his recent abode at Albia and elsewhere, but has been and still is unable to find him or to learn of his whereabouts.

That said C D has no other property in this state to the knowledge of this deponent, and that he has so disposed of his property with intent to defraud his creditors as this deponent verily believes.

That this deponent has commenced etc. (as in No. 1).

A B.

Sworn, etc.

No. 10.

Undertaking by Plaintiff.

See ante p. 63.

[TITLE OF CAUSE.]

Whereas, A B, the plaintiff in the above entitled action, has made application to the Hon. Charles R. Ingalls, one of the justices of the supreme court, (or to G R, Rensselaer county judge), for an order to arrest C D, the defendant in said action.

Now therefore, we, E F of Troy, merchant, and G H of Pittstown, farmer, do, pursuant to the statute in such case made and provided, hereby undertake, that if the said defendant recover

judgment in said action, the plaintiff will pay all costs which may be awarded to the said defendant, and all damages which he may sustain by reason of his arrest in said action, not exceeding the sum of *one hundred dollars*.

Dated, etc.

E F.

G H.

Signed and delivered in the presence of.

Add affidavit of justification, and acknowledgment, as in the following two forms.

No. 11.

Affidavit of Justification.

See ante p. 64.

County of Rensselaer, ss :

E F and G H, the sureties named in the foregoing undertaking, being severally duly sworn, doth each for himself depose and say, that he is a resident and householder (or freeholder) within this state, and worth *two hundred* dollars over and above all his debts and liabilities and exclusive of property exempt from execution.

E F.

Sworn, etc.

G H.

No. 12.

Acknowledgment.

See ante p. 64.

County of Rensselaer, ss :

On this *tenth* day of *July*, 1867, personally appeared before me, E F and G H, to me known to be the persons described in and who executed the foregoing undertaking, and severally acknowledged that they executed the same.

JOHN O'BRIEN,

Commissioner of Deeds.

No. 13.

Indorsement of Judge's Approval.

See ante p. 64.

I approve of the within undertaking, and of the sufficiency of the sureties therein named.

Dated, etc.

Signature.

No. 14.

Order of Arrest.

See ante p. 66.

[TITLE OF CAUSE.]

To the sheriff of the county of Rensselaer :

You are required forthwith to arrest C D, the defendant in this action, and to hold him to bail in the sum of *one thousand* dollars ; * (*the amount rests in discretion of the judge, but is generally double the plaintiff's claim*) and to return this order to Robley D. Cook, plaintiff's attorney, at his office, No. 53 Congress street, Troy, on the third day of September, 1867.

CHARLES R. INGALLS,

Dated, etc.

Justice Supreme Court.

Robley D. Cook, Plaintiff's Attorney.

No. 15.

Order of Arrest under Sub 3 of Section 179.

See ante p. 89.

[*As above to the * then add :*] By a written undertaking to the same effect as that provided by section 211 of the Code and to return this order to Jerome B. Parmenter, plaintiff's attorney, at his office in the city of Troy, on the third day of September, 1867.

CHARLES R. INGALLS,

Dated, etc.

Justice Supreme Court.

Jerome B. Parmenter, Plaintiff's Attorney.

No. 16.

Undertaking of Bail.

See ante p. 89.

[TITLE OF CAUSE].

Whereas, C D, the above named defendant, has been arrested in this action ;

Now therefore, we, L M, of Troy, grocer, and O. P. of the same place, hatter, do, pursuant to the statute in such case made and provided, hereby undertake, in the sum of *one thousand* dollars, that the said defendant shall, at all times, render himself amenable to the process of the court, during the pendency of this action, and to such as may be issued to enforce the judgment therein.

Signatures.

Dated, etc.

Justification and acknowledgment as in Nos. 11, 12.

No. 17.*Undertaking of Bail in an Action for Chattels.*

See ante p. 90.

[TITLE OF CAUSE.]

Whereas, the above entitled action has been brought to recover the possession of the following personal property : (here describe it) which is alleged to be unjustly detained ; and whereas, C D, the defendant in such action has been arrested therein for the cause mentioned in the third subdivision of section 179 of the Code of Procedure ;

Now therefore, we, L M, of Troy, grocer, and O P, of the same place, hatter, do acknowledge ourselves bound in the sum of (*double the value of the property as stated in the plaintiff's affidavit*) for the delivery of the said personal property to the plaintiff, if such delivery be adjudged, and for the payment to him, of such sum as may for any cause, be recovered against the defendant.

Signature.

Dated, etc.

Justification and acknowledgment as in Nos. 11, 12.

No. 18.

Notice of Exception to Bail.

See ante p. 95.

[TITLE OF CAUSE]

Sir: Take notice that the plaintiff does not accept the bail offered by the defendant in this action.

Yours etc.,

Dated, etc.

ROBLEY D. COOK,

Plaintiff's Attorney.

To the Sheriff of the county of Rensselaer.

No. 19.

Notice of Bail's Justifying.

See ante p. 95.

[TITLE OF CAUSE.]

Take notice that the same bail heretofore proposed by the defendant in this action, will justify before the Hon. Gilbert Robertson, Jr., Rensselaer county judge, at his office, in the city of Troy, on the tenth day of August next, at ten o'clock in the forenoon.

Yours etc.,

Dated, etc.

PARMENTER BROTHERS,

Or Defendant's Attorneys.

(G. W. C., sheriff of

Rensselaer county).

To Irving Hayner, Plaintiff's Attorney.

No. 20.

Notice of Justifying of other Bail.

See ante p. 95.

[TITLE OF CAUSE.]

Take notice, that J D, tailor, and P G, merchant, both residents of the city of Troy, who are proposed as bail in the place of L M and O P, the bail already offered, will justify (*same as in last form*).

No. 21.

Affidavit for Further Time to Justify, etc.

See ante p. 96.

[TITLE OF CAUSE.]

Rensselaer county, ss.:

C D being duly sworn says, that he is the attorney for the defendant in the above entitled action.

That E F, one of the sureties proposed by said defendant as his bail in this action, and whose name is mentioned in the notice of justification hereto annexed, promised and consented to become bail in this action for the said defendant, and has executed the required undertaking of bail. That he promised to attend this morning, at ten o'clock, before the Hon. Gilbert Robertson, Jr., Rensselaer county judge, at his office in the city of Troy, to justify as such bail. And this deponent verily believes that said E F was, and is, able to justify as good and sufficient bail in this action.

That this deponent fully expected that said E F would have attended this morning to justify accordingly, but he has not yet appeared for that purpose to the knowledge of this deponent. That this deponent has no knowledge of the cause of the absence of the said E F and is at present unable to account for the same,* but fully expects and believes that he will be able to produce the said E F for such justification to-morrow morning, July 23, before the Hon. Gilbert Robertson, Jr., at his office (*or if other bail is proposed, continue as above to the * and continue*). That this deponent, as attorney for the defendant, will propose, and desires further time to justify, as bail, in the stead of E F and G H, O K, merchant and R W, physician, both residents of Lansingburgh, in said county, who as this deponent believes are able to justify as good and sufficient bail in this action.

Signature.

Sworn, etc.

No. 22.

Order Extending Time to Justify.

See ante p. 96.

[TITLE OF CAUSE.]

Upon reading and filing the affidavit of C D herein, it is ordered that the defendant have ten days further time to justify O K and R W as bail for the said defendant in the stead of E F and G H.

Judge's signature.

Dated, etc.

No. 23.

Examination of Bail.

See ante p. 99.

[TITLE OF CAUSE.]

On this 7th day of July, 1867, before the undersigned G. Robertson, Jr., Rensselaer county judge, personally appeared O K and R W, the bail proposed by defendant C D in this action, for the purpose of justifying pursuant to notice; and the said O K being duly sworn, says (*take down the testimony showing the qualifications of bail*).

And the said R. W., also being duly sworn, says, etc.

Signature of bail.

Taken and sworn to before me this 7th day of July, 1867.

G. ROBERTSON, Jr.,
Rensselaer County Judge.

No. 24.

Allowance of Bail.

See ante p. 100.

[TITLE OF CAUSE.]

O K and R W, the bail of the defendant C D, within mentioned, having appeared before me and justified, I do find the said bail to be sufficient and allow the same.

Signature.

Dated, etc.

No. 25.

Same, with Order to Refund Money.

See ante p. 102.

[*Add to the above :*] And further order, that the sum of one thousand dollars deposited in the hands of the sheriff of the county of Rensselaer by the defendant, on his arrest in this cause, instead of bail, and since brought into court by the sheriff pursuant to the statute, be refunded by said sheriff to the said defendant.

Dated, etc.

Signature.

No. 26.

Certificate of Deposit in Lieu of Bail.

See ante p. 102.

[TITLE OF CAUSE.]

This is to certify that I have received from C D, the above named defendant, the sum of one thousand dollars, as a deposit in lieu of bail, being the amount mentioned in the order of arrest in this action.

G. W. CORNELL,
Sheriff of Rensselaer county.

Dated, etc.

No. 27.

Certificate by Clerk.

See ante p. 102.

[TITLE OF CAUSE.]

I certify that G. W. Cornell, sheriff of Rensselaer county, has this day paid into court, the sum of one thousand dollars, being the amount mentioned in the order of arrest in this action.

J. D., Clerk of Rensselaer county.

Dated, etc.

For order to refund on substituting bail, see No. 25.

No. 28.

Notice of Motion to Vacate Order of Arrest.

See ante p. 122.

[TITLE OF CAUSE.]

Take notice that on an affidavit, of which the within is a copy, and on all the papers in this action, the undersigned will move, at a special term of this court, to be held at the Court House in the city of Troy on the 29th day of July, 1867, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, to vacate the order of arrest granted in this action: and for such other or further order as may be just, and for the costs of this motion.

Yours, etc.,

ED. L. COLE,

Defendant's Attorney.

Dated, etc.

To Francis Rising, Esq., Plaintiff's Attorney.

No. 29.

Order Vacating Order of Arrest.

[TITLE OF CAUSE.]

On reading and filing notice of motion and affidavits of A B, and C D, and on the pleadings and proceedings in this action, on motion of M N, counsel for defendant, and after hearing H F, counsel for plaintiff (or, and on proof of due service of notice of motion on the plaintiff, and no one appearing in opposition); *

Ordered, that the order of arrest granted by D L, one of the justices of the supreme court, on the 14th day of June, 1867, against C D, the above named defendant, be vacated; and that the bail heretofore given for the defendant be exonerated from liability.

Signature.

Dated, etc.

No. 30.

Same, Order on Condition.

[*As in the above to the* continuing :*] Ordered, that on the defendant's stipulating within five days, to bring no action for false imprisonment, against said plaintiff by reason of arrest herein, said motion be granted, and the order of arrest heretofore granted in this action against said defendant be vacated, with ten dollars costs to the defendant, otherwise that said motion be denied with costs to the plaintiff.

Dated, etc.

Signature.

No. 31.

Authority from Bail to Arrest Defendant.

See ante p: 106.

Know all men by these presents, that we, M N and O K, the within named bail, do hereby depute, authorize and empower, in our place and stead, and in our behalf, E F of the city of Albany, N. Y. (*if officer add title*), to take, arrest, seize and surrender to the sheriff of the county of Rensselaer, C D, the within named defendant, in exoneration and discharge of our undertaking as bail for the said C D in said action; and we further authorize and empower him to employ such persons and assistants as may be necessary to effect such purpose, and to do any and all acts that we or either of us might lawfully do in the premises.

Dated, etc.

Signatures.

No. 32.

Certificate of Surrender.

[TITLE OF CAUSE.]

I hereby certify that C D, the defendant in this action, has this day surrendered himself to me (*or been surrendered by his bail*), and is now in my custody.

Dated, etc.

Signature.

No. 33.

Notice of Motion to Exonerate.

See ante p. 111.

[TITLE OF CAUSE.]

Take notice, that on the certificate (or affidavit), of which a copy is herewith served, and on the undertaking of bail in this action, I shall move before the Hon. C. R. Ingalls, one of the justices of this court, at his office in the city of Troy, on the sixth day of August next, at ten o'clock in the forenoon,* for an order exonerating M N and O K, the defendant's bail in this action, from all further liability as such bail, and for such other relief as may be just.

Yours, etc.,

C. E. PATTERSON,

Defendant's Attorney.

To T. S. Banker, Plaintiff's Attorney.

No. 34.

Order Exonerating Bail.

See ante p. 111.

[TITLE OF CAUSE.]

On reading and filing the annexed certificate of the sheriff of Rensselaer county (or affidavit of M N), and a copy of the undertaking of bail given by M N and O K in this action, and on motion of C M, counsel for defendant, and after hearing S T, counsel for plaintiff (or on proof of due service of the notice of this motion on the plaintiff);

Ordered, That M N and O K, the said bail, be, and the same are hereby exonerated from all liability.

Signature.

Dated.

No. 35.

Notice of Motion to Enlarge Time to Surrender.

See ante pp. 107, 114.

[*As in No. 33 to the *, then continue :*] For an order that M N and O K, the defendant's bail in this action, have thirty days' further time to surrender such defendant to the sheriff in their exoneration, and for such other relief as may be just.

Signature.

Dated.

Address.

No. 36.

Affidavit to Support such Motion.

See ante pp. 107, 114.

[TITLE OF CAUSE.]

Rensselaer county, ss :

M N being duly sworn, says that he is one of the bail for the above named defendant, C D ; that said C D was arrested on or about the third day of January past, by virtue of an order of arrest, granted in said action by the Hon. H E, one of the justices of this court, on the ground that (here state ground), and that on the sixth day of January last this deponent and O K became bail for said defendant by an undertaking of which a copy is hereto annexed.

That (here state excuse for not surrendering in season, giving particulars).

That (state, if possible, facts showing that a surrender is possible).

That no action has been commenced against said bail, as deponent is informed and believes.

Signature.

Sworn, etc.

If an action has been commenced against the bail, make the motion in such new action.

No. 37.

Bond for Jail Liberties.

See ante pp. 86, 138.

Know all men by these presents, that we, C D, M N of Troy, and O K of Pittstown, Rensselaer county, N. Y., are held and firmly bound unto Gerotham W. Cornell, sheriff of the county of Rensselaer, in the sum of *one thousand* dollars, to be paid to the said Gerotham W. Cornell, his executors, administrators and assigns, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators and assigns firmly by these presents. Sealed with our seal, and dated the tenth day of May, 1867.

Whereas, The above bounden C D is now in custody of the above named sheriff, by virtue of an order of arrest granted by the Hon. C E, one of the justices of the supreme court, at the complaint of A B, on the first day of May last, which order directs said defendant to be held to bail in the sum of one thousand dollars.

Now, therefore, the condition of this obligation is such that if the above bounden C D shall remain a true and faithful prisoner in custody as aforesaid, and shall not at any time, nor under any circumstances, go without the limits of the jail liberties, as established for the jail of said county of Rensselaer, until discharged by due course of law, then this obligation to be void; otherwise to remain in full force and virtue.

Signatures and seals.

Sealed and delivered in presence of.

Add justification and acknowledgment as in Nos. 11 and 12.

No. 38.

Requirement of Bail to Jail Keeper.

See ante p. 86.

To C F, keeper of the jail in and for the county of Rensselaer :

We, M N and O K, sureties in a certain bond executed by us, together with C D, to Gerotham W. Cornell, sheriff of the county

of Rensselaer, bearing date on the tenth day of May, 1867, for the purpose of obtaining for said C D, then in custody of said sheriff, jail liberties of said county, hereby require you to take said C D into your custody, and to indorse upon the said bond an acknowledgment of the surrender of the said C D. And we also require you to give us a certificate acknowledging such surrender.

Signatures.

Dated, etc.

No. 39.

Certificate of Surrender.

See ante p. 87.

I, C F, keeper of the jail in and for the county of Rensselaer, hereby certify that M N and O K, of said county, sureties in a certain bail bond, executed by them with C D on the tenth day of May last, to Gerotheram W. Cornell, sheriff of Rensselaer county, for the purpose of obtaining for said C D the jail liberties of said county, have this day surrendered said C D into my custody, in exoneration of themselves as sureties in said bond. And I further certify that an acknowledgment of such surrender has been by me duly indorsed on said bond according to the statute.

C F.

Dated.

CHAPTER II.

FORMS IN CLAIM AND DELIVERY.

No. 40.

Affidavit to Obtain Delivery.

See ante pp. 141, 169.

[TITLE OF CAUSE.] *Omit title of action if not commenced.*

County of Rensselaer, ss :

A B (or E F the agent of), the *plaintiff in the above entitled action*, being duly sworn, says, that he is the owner (or that the said A B is the owner), and entitled to the immediate possession of (or that he has a special property in (*describing it*), and is entitled to the immediate possession of) the following personal property, to wit: (*describing it particularly*).

That the said property is wrongfully detained by C D, the defendant above named (or C D of the city of Troy).*

That the alleged cause of the detention thereof, according to deponent's best knowledge, information and belief is as follows. (*State the alleged cause*).

That the said property has not been taken for a tax assessment, or fine, pursuant to a statute, or seized under an execution or attachment against the property of the said plaintiff.

That the actual value of said property is the sum of five hundred dollars.

A B.

Sworn, etc.

No. 41.

Denial of Knowledge of Cause of Detention.

See ante p. 171.

(*Substitute for clause third in form 40*). That this deponent has no knowledge or information of any cause alleged for such detention.

No. 42.

Of Property Exempt from Execution.

See ante p. 171.

[*Same as in No. 40 to the * continuing :*] That the said property has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the said plaintiff, except as hereinafter stated.

That the said C D claims to be the sheriff of Rensselaer county, and as such sheriff to have levied upon the said property under an execution alleged to have been issued against the property of this plaintiff, which is the alleged cause of the detention of said property according to deponent's best knowledge, information and belief.

That this plaintiff is a householder and resides in this state, and that said property is a part of his necessary household furniture, the whole value of which was less in the aggregate than *two hundred and fifty* dollars, besides the articles specified in the revised statutes as exempt, and that the said property so seized by the said C D is exempt by law from levy and sale on execution, as deponent is advised by counsel and verily believes (*or that the plaintiff is a householder, within the state, and has a family depending upon him for support, and that he is by occupation, a carpenter ; that the property above mentioned are the working tools of this plaintiff necessary to the carrying on of his said business*).

That the actual value of the said property is the sum of one hundred dollars.

A B.

Sworn, etc.

No. 43.

Requisition to Indorse on Affidavit.

See ante p. 173.

To the sheriff of the county of Rensselaer :

Sir : You are hereby required to take the within mentioned and described property from the defendant, and to deliver the same to the plaintiff in this action.

WILLIAM SHAW,
Plaintiff's Attorney.

No. 44.

Undertaking by Plaintiff.

See ante p. 174.

[TITLE OF CAUSE.]

Whereas the above named plaintiff has commenced (or is about to commence) an action against the above named defendant, for the recovery of the following personal property, to wit. (*Specify property*).

And whereas the said plaintiff has, by his affidavit and indorsement thereon, duly required the sheriff of the county of Rensselaer, to take the said property, from the said defendant, and to deliver the same to the plaintiff.

Now therefore, in consideration of the premises, and of the taking of such property, or any part thereof, by the sheriff, and its delivery to the plaintiff, as in such indorsement required, We, M N of Albany, merchant, and O K of New York, banker, do hereby undertake and become bound unto the defendant, in the sum of dollars (*double the value of the property as stated in the affidavit*), for the prosecution of this action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him, of such sum as may, for any cause, be recovered against the plaintiff in this action.

Signatures.

Dated, etc.

Signed and delivered in presence of.

Justification and acknowledgment as in Nos. 11 and 12.

No. 45.

Approval of Sheriff, Indorsed on Undertaking.

See ante p. 175.

I approve of the within undertaking, both as to its form and as to the sufficiency of the sureties therein.

Signature.

Dated.

Notice of exception and justification may be similar to Nos. 18 and 19.

No. 46.

Undertaking by Defendant to Obtain Return of Property.

See ante p. 184.

[TITLE OF CAUSE.]

Whereas, the plaintiff in this action has claimed a delivery to him of the following personal property, to wit : (*describe it*) of the alleged value of one thousand dollars; and whereas, the said plaintiff has caused such property to be taken by the sheriff of the county of Rensselaer, pursuant to the second chapter, of the seventh title, of the second part of the Code of Procedure, but the same has not been yet delivered to the plaintiff; and whereas the defendant is desirous of having said property returned to him.

Now therefore, we M. N. of Pittstown, farmer, and O. K. of Grafton, broker, for the procuring of such return, and in consideration thereof, do hereby undertake and become bound to the said sheriff in the sum of *two thousand* dollars for a delivery of said property to the plaintiff, if such delivery shall be adjudged, and for the payment to him of such sum as may, for any cause be recovered against the defendant in this action.

Signature.

Witness.

Justification and acknowledgment as in Nos. 11 and 12. Notice of justification and proceedings thereon similar to Nos. 19 and 23.

No. 47.

Notice to Sheriff to Return Property.

See ante p. 184.

[TITLE OF CAUSE.]

To M. N., sheriff of, etc.

You are hereby required to return to the defendant the personal property taken and held by you in this action.

F. W. ACKLEY,

Defendant's Attorney.

Dated, etc.

No. 48.

Affidavit of Claim by Third Person.

See ante p. 188.

[TITLE OF CAUSE.]

County of Rensselaer, ss :

R S of Troy, in said county, being duly sworn says, that he is the sole owner (or that he and one O P, are joint owners), of certain personal property taken by the sheriff of the said county of Rensselaer in this action, which property is described as follows. (*describe property*) That this deponent purchased the said property of the defendant, on the third day of April, 1867, paying therefor the sum of six hundred dollars, and that he has not sold or disposed of the said property, or any part thereof. (*Show clearly nature of title*).

Sworn, etc.

R S.

No. 49.

Notice to Sheriff, Claim of Third Person.

See ante p. 190.

To the sheriff of, etc.

Sir : You will please take notice that I claim the personal property mentioned in the within (*or annexed*) affidavit, and that you are required to deliver the same to me.

Dated, etc.

R S.

No. 50.

Sheriff's Notice of Third Person's Claims.

See ante p. 190.

[TITLE OF CAUSE.]

You will please take notice that R S claims the property taken by me in this action, and that unless the plaintiff indemnifies me against such claims, I shall not keep the property or deliver it to the plaintiff.

Yours etc.,

Signature.

Dated, etc.

No. 51.

Undertaking to Indemnify Sheriff.

• See ante p. 190.

[TITLE OF CAUSE.]

Whereas, the above named plaintiff, claims the possession of the following personal property (*describe it*), now in the possession of the sheriff of the court of Rensselaer and taken by him in this action; and whereas, one R S claims to own and have the right of possession of said property :

Now therefore, we M N of No. 93 Congress street, Troy, druggist, and O K of No. 29 River street in said city, grocer, undertake to indemnify the said sheriff against the claims of the said R S, if the said property be delivered to the plaintiff.

Signature.

Witness.

Add justification and acknowledgment as in Nos. 11 and 12.

No. 52.

Notice of Motion to Set Aside Proceedings.

See ante p. 190.

[TITLE OF CAUSE.]

You will please take notice that on the annexed affidavit (*or on whatever the motion is based*) a motion will be made, at a special term of the supreme court to be held at the office of Hon. C. R. Ingalls, in the city of Troy, on the twentieth day of July, 1867, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, that the affidavit made by the plaintiff in this action and the requisition indorsed thereon, and all proceedings taken by the plaintiff, or by the said sheriff, respectively, by virtue thereof, may be set aside as void (or as irregular) in that, etc. (*specifying objec-*

tion), and that the property taken by the said sheriff under said affidavit and requisition may be restored by him to the said defendant, and for such other or further relief as may be just, and for the costs of this motion.

Yours, etc.,

JEROME B. PARMENTER,

Defendant's Attorney.

Dated, etc.

To Robley D. Cook, Esq., Plaintiff's Attorney.

CHAPTER III.

FORMS FOR INJUNCTIONS.

No. 53.

Affidavit in Support of Complaint.

See ante p. 317.

[TITLE OF CAUSE.]

Rensselaer county, ss.

A B of Troy in said county, being duly sworn says, that he has read the complaint in this action, that he is familiar with all the material matters therein stated on the information and belief of the plaintiff, and has actual knowledge thereof. That from such knowledge he knows that the matters therein so stated are true. (*Set forth the source of information*).

Signature.

Sworn, etc.

Another Form.

See ante p. 317.

[TITLE OF CAUSE.]

Rensselaer county, ss.

A B of Troy, being duly sworn says, that he is the attorney in fact for the above named plaintiff, for the purpose of suing for and recovering the sum of money mentioned in the complaint in this action, by virtue of a power of attorney under seal, for that purpose duly executed.

That the said plaintiff is now absent from the state, and that he left the city of New York for Liverpool in England, on the third day of May last, and, as this deponent verily believes, has not yet returned to this country.

That this deponent has read the complaint in this action, and knows the contents thereof, and that he has actual knowledge (*or information*) of all the material allegations therein stated, and from such knowledge (*or information*) believes such matters to be therein truly stated and such complaint to be true. (*Here may set forth source of information*).

A. B.

Sworn, etc.

No. 54.

Notice of Motion for Injunction.

See ante p. 199.

[TITLE OF CAUSE.]

Please take notice, that on the complaint in this action (and on the annexed affidavit), a motion will be made at a special term of this court, to be held at court house in the city of Troy, on the first day of November next, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an injunction order to restrain the defendant, his agents and servants from (*here state concisely the object*), and for such further or other order as may be just.

Yours, etc.,

BANKER & RISING,

Plaintiff's Attorneys.

Dated, etc.

To James Lansing, Defendant's Attorney.

No. 55.

Order to Show Cause with Injunction.

See ante p. 321.

[TITLE OF CAUSE.]

On the annexed complaint and affidavit of A B, let the defendant show cause before me (*or at a special term of this court*), at, on the ... day of, 18..., why an injunction should not be issued restraining him from (*here state acts to be enjoined*), and for such other or further relief as may be just.

And it is further ordered, that said defendant, his agents and servants, be and are hereby enjoined and restrained from committing or suffering to be committed any of said acts until the decision of the court (*or judge*), granting or refusing the said injunction.

Signature.

Dated, etc.

Address.

No. 56.

Undertaking for Injunction.

See ante p. 324.

[TITLE OF CAUSE.]

Whereas, the plaintiff in the above entitled action has applied (*or is about to apply*), for an injunction restraining the above named C D from (*state briefly the object*).

Now, therefore, we, M N of Troy, merchant, and O K of Lansingburgh, mason, do hereby undertake, pursuant to the statute in such case made and provided, that the said plaintiff will pay to the said C D such damages, not exceeding *five hundred* dollars, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. (The damages may be ascertained by a reference, or otherwise, as the court shall direct), *usual, though not essential*.

Signatures.

Dated.

Witnesses.

Add justification and acknowledgment as in Nos. 11 and 12.

No. 57.

Bond to Stay Proceedings as Provided by Statute.

See ante pp. 270, 324.

Know all men by these presents, that we, A B of the city of Troy, C D of the same place, and E F of the city of Albany, are held and firmly bound unto O K of said city of Troy, in the sum of *one thousand* dollars, to be paid to the said O K, his executors, adminis-

trators and assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this ninth day of June, 1867.

Whereas, the above bounden A B has applied to the *supreme* court of the state of New York for an injunction against the above named O K to stay proceedings at law in a certain personal action pending in the *said* court, wherein the said O K is plaintiff and the said C D is defendant, after (verdict and before) judgment therein. Now, the condition of this obligation is such that if the above bounden A B shall well and truly pay unto the said O K, his executors, administrators or assigns, all such damages and costs as may be awarded to him or them by the court at the final hearing of the cause (*and if deposit is dispensed with add*, and shall also pay the sum of, *specifying the amount of deposit*, whenever ordered by the court), then this obligation to be void, otherwise to remain in full force and virtue.

Signatures and Seals.

Signed, sealed, etc.

Add justification and acknowledgment as in Nos. 11 and 12.

No. 58.

Injunction by Judge.

See ante p. 199.

[TITLE OF CAUSE.]

It appearing satisfactorily to me, by the complaint in this action, and the affidavit of A B, the plaintiff, that sufficient grounds therefor exist :

I do hereby order, that the defendant C D, his agents and servants, do refrain from (state act to be enjoined as in forms Nos. 61 to 84) until the further order of this court, and in case of disobedience to this order, the said C D, his agents and servants, will be liable to the punishment therefor prescribed by law.

Signature of Judge.

Dated, etc.

R. D., Plaintiff's Attorney.

No. 59.

Injunction by Court.

See ante p. 199.

At a special term of the supreme court, held in and for the county of Rensselaer at the Court House in the city of Troy, on the tenth day of June, 1867.

Present, Hon. C. R. Ingalls, Justice.

[TITLE OF CAUSE.]

On reading and filing the complaint in this action (and the affidavit of A B, dated the 9th day of June, 1867), and on motion of Jerome B. Parmenter, counsel for plaintiff;

Ordered that (*proceed as in previous form*).

No. 60.

Continuing Injunction after Order to Show Cause.

See ante p. 321.

[TITLE OF CAUSE.]

On return of the order to show cause made *by me*, in the above entitled action on the tenth day of May, 1867, and returnable this day at my office in the city of Hudson, and after hearing Irving Haynor, for the plaintiff and Robley D. Cook for the defendant;

Ordered, that the injunction order, granted with the said order to show cause, be and the same is hereby continued until the further order of this court on the said plaintiff's executing a written undertaking (with *two* sufficient sureties) pursuant to the statute and the practice of this court, to the effect that he will pay said defendant, such damages, not exceeding the sum of *one hundred* dollars, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff is not entitled thereto.

HENRY HOGEBOOM,

Dated, etc.

Justice Supreme Court.

Irving Haynor, Plaintiff's Attorney.

No. 61.

*Statement of Acts Enjoined to be Inserted in Form No. 58.
Against Waste or Alienation.*

See ante p. 210.

From pulling down or otherwise injuring the buildings standing on the premises hereinafter described, or any part thereof, or from committing any waste or destruction upon said premises, and from executing and procuring to be executed any instrument of conveyance of said premises, to any person or persons other than the plaintiff, or as he shall direct. (*Bound and describe premises*).

No. 62.

Against Waste by Cutting Timber.

See ante pp. 210, 606.

From cutting, felling, barking or otherwise wasting or impairing, or in any way disposing of any wood, timber or trees now standing or growing upon that certain farm of land (*describe it*), and from committing any further, or other waste, or destruction in or upon the said land or premises.

No. 63.

Against Working Mine.

See ante pp. 210, 606.

From working the veins or seams of coal, iron, stone and other minerals, lying in, upon, or under (*designate lands*), and from digging, getting and carrying away or selling, or disposing of the coal, iron, stone and other minerals produced therefrom, and from interfering in any manner with said mines.

No. 64.

Against Removing Lateral Support.

See ante p. 221.

From excavating or removing any soil or dirt from any land adjoining the plaintiff's premises (*designating them*), which shall cause, or greatly tend to cause the plaintiff's land, by reason of the withdrawal of its lateral support, to pull away, crack or subside.

No. 65.

Against Taking Possession of Lands without Payment.

See ante pp. 210, 244.

From entering upon, or in any way, occupying any part of the lands hereinafter described, until the said defendants shall have complied with the terms of a certain award made on the eighth day of April, 1867, by L M, C D and O K, arbitrators duly chosen by the parties hereto, and shall have paid to the said plaintiff, the sum of *three hundred* dollars, as by said award provided.

No. 66.

Against Removing Fixtures.

See ante p. 210.

From severing or removing, or causing to be severed or removed from the premises hereinafter described, any growing trees, fruit or grass (*or any looms, engines, or machinery*), or fixtures of any kind. Said premises are known as (*describe them*).

No. 67.

Against Obstructing a Way.

See ante p. 238.

From stopping up, obstructing, or injuring or causing to be stopped up, obstructed or injured, the free passage of (*distinctly designating the way*).

No. 68.

Against Erecting or Continuing Buildings.

From erecting, constructing, or continuing to erect or construct any building or structure whatever, on the piece or parcel of land described as follows (*description*) or any part thereof (and also from permitting and continuing any such building or structure, or parts thereof, as have already been commenced or erected on said land from remaining thereon).

This form was approved in Rankin v. Huskisson, 4 Sim., 13. The latter clause will seldom, if ever, be proper, in a preliminary injunction, as its object is merely restrictive.

No. 69.

Against Violating Building Covenant..

See ante p. 241.

From erecting upon (designate the land) any brewery, or other building, except one private house, or ornamental cottage, to be erected on (*designate what part*). (*Approved in Maun v. Stephens, 15 Sim., 377.*)

No. 70.

Against Nuisance.—Slaughter House.

See ante p. 236.

From occupying or using, or causing to be occupied or used as a slaughter house, a certain building, standing (*particularly designating it*), and also from slaughtering, or permitting to be slaughtered therein any animals (so as to occasion damage or annoyance to the plaintiff as owner, or to his tenants respectively as occupiers of a dwelling house situated (*designating*)).

No. 71.

Against Laying a Rail Road in a City.

See ante p. 245.

From entering into or upon Congress street in the city of Troy, for the purpose of building, laying, or establishing a rail road therein, or from breaking or removing the pavement, or digging, or removing the soil therefrom, or from doing any other act in such street tending to encumber it, or to prevent the free and common use thereof, as the same has been heretofore used and enjoyed (until compensation etc.).

No. 72.

Against Authorizing Laying of Rail Road in City Street.

See ante pp. 245, 297.

From granting to C D and others, the persons named in a resolution, a copy of which is hereto annexed, or their associates, or any other person or persons whatsoever, the right, liberty or privilege of laying a double track, or any track for a railway, in said Broadway, from the south ferry to 57th street, or of breaking or removing the pavements, or digging or removing the dirt therefrom, or in any manner of obstructing said street, preparatory to or for the purpose of laying or establishing any railway therein or in any manner authorizing them so to do. (*Sustained by People v. Sturtevant*, 9 N. Y. R., 263.)

No. 73.

Against Carrying on Business Forbidden by Lease.

See ante p. 241.

From carrying on, or continuing, the auction business, or selling goods at public auction in the store (particularly designated), and from conducting therein any business other than the regular dry goods jobbing business.

No. 74.

Against Transfer of Negotiable Paper.

See ante p. 265.

From indorsing, assigning, or in any manner transferring (*here particularly describe paper*).

No. 75.

Against Publishing Private Letter.

See ante p. 256.

From printing, publishing, circulating, or in any manner, either by writing or otherwise, making public a letter written by (*describing*), or any part thereof.

No. 76.

Against Disclosure of Secret by Clerk.

From taking or retaining any copy of, or extract from, any of the books, papers, or documents of the above named A B & Co., or either of them, in the possession, custody or power of the defendant; and from communicating any contents thereof, or any information therein contained, to any person or persons whatsoever; and from communicating, or in any manner disclosing, any of the information possessed or acquired by him relating to the said copartnership, or the affairs or secrets thereof, or the clients thereof, by means of his having been employed as clerk by said A B & Co., and having access to said books and papers.

No. 77.

Against Use of Secret in Trade.

See ante p. 255.

From selling, or causing to be sold, under the title and designation of "Morison's Universal Medicine," or "Morison's Vegetable Universal Medicine," any medicine or compound made or manufactured by the defendant, or by or under his order or direction, and from making or compounding any medicines according to the secrets in the complaint mentioned, etc.; and from in any manner using the secret of compounding the said medicine or any part thereof (*See this form in Morison v. Moat, 9 Hare, 241*).

No. 78.

Against Infringing Trade Mark.

See ante p. 255.

From selling, or exposing for sale, or procuring to be sold, any composition or blacking described as, or purporting to be, blacking manufactured by Day & Martin, in bottles, having affixed thereto such labels as are mentioned in the complaint in this action, or any other label, so contrived or expressed as, by colorable imitation or otherwise, to represent the composition or blacking sold by the said defendant, to be the same as that manufactured and sold by the plaintiff; and from using trade cards so contrived or expressed as to represent that any composition or blacking sold, or proposed to be sold by the defendant, is the same as that manufactured or sold by the plaintiff.

No. 79.

In Partnership Cases.

See ante p. 302.

From selling, assigning, or transferring, receiving, collecting, discharging or encumbering, or in any manner disposing of, or interfering with any portion of the property, real or personal, of the

copartnership heretofore (and now) existing between the plaintiff and the defendant herein, or of the debts, accounts, demands, bills, notes, evidences of debt, things in action, or other equitable property or interest whatever of said copartnership, and from doing or suffering to be done, any act or thing to enable any person to obtain any portion of said property.

No. 80.

Where Dissolution is not Sought.

See ante p. 302.

From applying any of the moneys and effects of the copartnership heretofore and now existing between the said C D and this plaintiff, in any manner otherwise than in the usual and ordinary business, from obstructing or interfering with the plaintiff in the exercise and enjoyment of his rights and privileges under the partnership articles.

No. 81.

Against Proceedings at Law.

See ante p. 269.

From proceeding further in the action at law against the said A B, and in which the said C D is plaintiff, upon a bond made, etc. (*describing it*), and from instituting or proceeding in any new or other action at law upon such bond; and from instituting any action against the said plaintiff for the recovery of (*designate the debt, etc.*).

No. 82.

Against Dispossessing Tenant.

See ante p. 269.

From proceeding to dispossess the plaintiff of the (*describe premises*) or from issuing or causing to be issued, any warrant of dispossession, or from taking possession under the proceedings commenced before T N, a justice of the peace in the city of Troy, on the ground that rent was unpaid.

No. 83.

In Creditor's Action.

See ante p. 280.

From selling, assigning, or transferring, receiving, collecting, discharging or incumbering, or in any manner disposing of, or interfering with, any property, real or personal (not exempt by law from execution) things in action, or other equitable property or interests of any kind whatsoever, held or controlled by him, or by any other person in trust for him, or for his use or benefit, or in which he has any interest whatsoever, and also from making any assignment of his property, or from confessing any judgment for the purpose of giving preference to any other creditor over the plaintiff, or for any other purpose, or from doing or suffering to be done, any other act or thing to enable other creditors or persons to obtain any portion of his said property.

No. 84.

From Disposing of Property with Intent to Defraud Creditors.

See ante p. 313.

From selling, assigning, transferring or otherwise disposing of, or removing any of his property, either real or personal, except what is by law exempt from execution, with intent to defraud, hinder or delay creditors, or from any manner interfering therewith with such intent.

No. 85.

Notice of Motion to Dissolve or Modify Injunction.

See ante p. 334.

[TITLE OF CAUSE.]

Please take notice that on (*designate the papers*) a motion will be made at a special term of this court, to be held at the Court House, in the city of Troy, on the third day of November, 1867, at ten o'clock in the forenoon, or as soon thereafter as counsel can be

heard, or before (*designating the judge who granted the order*) at his office, etc., to dissolve the injunction issued in this action (*or to modify the injunction issued in this action so as to permit the defendant to, etc.*), with costs, and for such other or further relief as may be just.

Yours, etc.,

Dated, etc.

BANKER & RISING,

Defendant's Attorneys.

To Parmenter Brothers, Plaintiff's Attorneys.

No. 86.

Order Dissolving Injunction.

See ante p. 334.

[TITLE OF CAUSE.]

If made by the court, say: At a special term, etc.

On reading and filing the answer of the defendant in this action (and the affidavit of C D), and on motion of Francis Rising, counsel for defendant, and after hearing Jerome B. Parmenter, counsel for the plaintiff (*or, and on proof of due service of notice of motion, and no one appearing*) in opposition thereto;

Ordered, that the injunction granted by me (*or by C R, a justice of this court*) on the first day of July, 1867, against the above named C D be vacated and dissolved (with ten dollars costs to abide the event of the action).

Signature.

No. 87.

Notice of Motion to Ascertain Damages.

See ante p. 341.

[TITLE OF CAUSE.]

Please take notice, that, on the undertaking and proceedings in this action, and on the affidavit of C D, a copy of which is herewith served, a motion will be made, at a special term of this court, to

be held in the City Hall, in the city of Albany, on the twenty-eighth day of July, 1867, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for a reference to ascertain the damages sustained by the defendant, by reason of the injunction granted in this cause, on the tenth day of June, 1867, by G R one of the justices of this court; and for such other and further relief as may be just, besides the costs of this motion.

Yours, etc.,

Dated, etc.

SEYMOUR & PATTERSON,

Defendant's Attorneys.

To Beach & Smith, Plaintiff's Attorneys.

No. 88.

Order of Reference.

See ante p. 341.

[TITLE OF CAUSE.] *At a special term, etc.*

On reading and filing notice of this motion and the affidavit of C D, and on motion of M N, counsel for the defendant, and after hearing O K, counsel for the plaintiff;

Ordered, that it be referred to R D, of the city of Troy, to ascertain the damages sustained by the defendant by reason of the said injunction, and to report the same to the court (and that *eight days'* notice of the hearing be given H R and E F the sureties named in the undertaking on obtaining such injunction).

Signature.

Dated, etc.

No. 89.

Order Confirming Report.

See ante p. 341.

[TITLE OF CAUSE.] *At a special term, etc.*

On reading and filing the notice of this motion, and affidavit and certificate, and the referee's report and the evidence on which the

same was based, and on motion of M N, counsel for the defendant, and after hearing O K, counsel for plaintiff (*and for sureties*) in opposition thereto ;

Ordered, that the said report of the referee herein be, and the same hereby is, in all respects confirmed (except as to the item, etc., and as to that item, that it be reduced to *three* dollars, and that on the defendant's consenting to such reduction the report be thereon confirmed) with ten dollars costs of this motion.

CHAPTER IV.

FORMS IN ATTACHMENTS.

No. 90.

Affidavit—general form.

See ante p. 375.

[TITLE OF CAUSE.]

County of Rensselaer, ss :

A B, plaintiff in the above entitled action being duly sworn says, that the above named defendant is indebted to this deponent *in the sum of five hundred dollars, upon a promissory note made by the defendant, dated May 1st, 1867, payable to the plaintiff or order, sixty days after date.* That the above entitled action is brought for the recovery of said indebtedness, and that the summons therein has been issued (*or is about to be issued*), to the sheriff to be served.*

And defendant further says, that the said defendant is not a resident of this state, but resides in the city of Kenosha in the state of Wisconsin.

A B.

Sworn, etc.

No. 91.

Same—Foreign Corporation.

See ante p. 375.

[*As above to * continuing :*] And plaintiff further says, that the defendant is a foreign corporation, created by, or under the laws of the state of *Vermont*, having its office and place of business at Burlington, in said state. (That the defendant has property within

this state at Albany, consisting of (*describe property*). That the plaintiff is a resident of this state, and resides at Troy. (*Or, that the cause of action above stated arose in this state ; or, that the subject of the action is situated within this state*).

A B.

Sworn, etc.

No. 92.*Affidavit where Defendant has Absconded.*

See ante pp. 361, 375.

[*As in No. 90 to * continuing :*] That defendant is a resident of this state, but has departed therefrom (*or keeps himself concealed therein*) with intent as this deponent believes to defraud his creditors, or to avoid the service of a summons, and the grounds of his belief are as follows : (*Here state fully and in detail the facts and circumstances,* Thus) the said defendant has, until within a week past, been engaged in business as a merchant in the village of Cohoes, in the county of Albany, that he has lately been engaged in collecting in all debts and moneys due him, and in converting his property into money, and has sold the goods in his store for a less price than the real value. That on Monday last he closed his store, and placed a card on the outer door, whereon was written "Gone to New York, return on Friday." That he stated, on the same day to this deponent, and others, that he was going to New York to purchase goods. That since that time said defendant has not returned to his said residence. That on Saturday last it was found on examination, that all defendant's goods and property had been removed from his said store. That J K of Troy saw said defendant on Monday last at Buffalo, as will appear more fully by his affidavit hereto annexed, and that said defendant then and there informed him that he was going to the state of Wisconsin, and should purchase land and settle there, and should also send for his family.

A B.

Sworn, etc.

No. 93.

Another Form.

See ante pp. 361, 375.

[*As in the above to the statement of facts continuing :*] Deponent is informed by O K, and believes that the said C D stated to him, on the first day of April, 1867, that " he meant to get out of the way for a while and let the storm blow over," meaning that he wished to avoid his creditors.

That O K being clerk of the said C D, refuses to make his affidavit to the above.

A B.

Sworn, etc.

No. 94.

Affidavit where Defendant is about to Remove Property.

See ante pp. 365, 375.

[*As in No 90 to * continuing :*] That, as deponent is informed and believes, said defendant is about to leave this state, and take with him his family, and that he is going to Europe, and that the sources of deponent's information are as follows : (*specifying them carefully, and indicating, why informant's affidavit is not obtained*).

That, as deponent is informed and believes said defendant has packed up a large amount of silver-ware, and other valuables, which said defendant is about to take with him out of this state, and which are the property of said defendant, and that deponent's sources of information are as follows : (*as above*).

That as deponent is informed and believes, said defendant is making arrangements to convert other portions (*or the remainder*) of his property into cash, with the intention, as deponent verily believes, of removing the same from this state, and that deponent's sources of information are as follows : (*as above*).

That the said defendant has repeatedly said to the deponent that he did not intend to pay one cent on the aforesaid note : and deponent verily believes that said defendant intends to remove and dispose of his property as aforesaid in order to defraud his creditors.

A B.

Sworn, etc.

No. 95.

Undertaking for Attachment.

See ante p. 381.

[TITLE OF CAUSE.]

Whereas the above named plaintiff has applied to the *Hon. Rufus W. Peckham*, one of the justices of this court, for a warrant of attachment against the property of the defendant C. D. on the ground that the said defendant is a non-resident of this state (or other cause).

Now therefore we, John Doe of Pittstown, in the county of Rensselaer, farmer and Richard Roe, of the same place, blacksmith, do undertake, pursuant to the statute in such case made and provided, in the sum of *five hundred* dollars, that if the said defendant recover judgment in this action, or the said attachment be set aside by the order of the court, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum above mentioned.

Add justification and acknowledgment as in Nos. 11 and 12.

No. 96.

Warrant of Attachment.

See ante p. 385.

[TITLE OF CAUSE.]

The people of the state of New York,

To the sheriff of the county of Washington,

Greeting :

Whereas, an application has been made to the undersigned by A B, plaintiff, for a warrant of attachment against the property of C D, defendant; and it appearing by affidavit that a cause of action exists against the said C D for the sum of *one thousand* dollars, the grounds whereof are set forth, and that the said C D is a non-resident of this state (*or other cause*), and the said plaintiff having given the undertaking provided by law ;

Now therefore, you are hereby required to attach and safely

keep all the property of the said defendant C D within your county, or so much thereof as may be sufficient to satisfy the plaintiff's demand of *one thousand* dollars, together with costs and expenses, and that you proceed hereon in the manner required of you by law.

Witness, W F A, one of the justices of the supreme court, at the village of Salem, this tenth day of July, 1867. (*The teste clause is not essential, though proper*).

Signature.

John H. McFarland, Plaintiff's Attorney.

No. 97.

Sheriff's Return to Attachment.

See ante p. 456.

County of Washington, ss :

I, H M, sheriff of said county, do hereby certify and return, that, by virtue of the within attachment, I have seized and taken into my possession the property of the defendant within named, specified in the inventory hereto annexed, and have appraised the property therein specified at the sums stated in the said inventory.

H M.

Dated, etc.

No. 98.

Inventory of Property Attached.

See ante p. 413.

[TITLE OF CAUSE.]

We, H M, sheriff of the county of Washington, and O K and E F, two disinterested freeholders of said county, hereby certify that the following is a just and true inventory of all the property seized by H M, the said sheriff, on a warrant of attachment issued in the above entitled action by W F A, a justice of the supreme court, together with a statement of the books, vouchers and papers taken into the custody of said sheriff by virtue of said warrant, and the value of

each article of personal property, and also a true statement of such articles thereof as are perishable, as the same have been appraised by us, viz: (*insert list of items of real and personal property, setting value opposite each*).

We do further certify that the following property mentioned in said inventory is perishable, viz: (*items*).

Dated, etc.

Signatures.

No. 99.

Order for Sale of Perishable Property.

See ante p. 426.

[TITLE OF CAUSE.]

It appearing to me, by the inventory made and returned under the warrant of attachment, granted by me in this action, that the following property, mentioned in said inventory, is perishable, viz: (*describe it*).

It is hereby ordered, that the said property so specified as perishable, be sold by the said sheriff, at public auction, at such time and place as he shall deem advisable, within the town of Cambridge, and that said sheriff give notice of such sale, in like manner as on sale of personal property, on execution. It is further ordered that said sheriff retain the proceeds of such sale, and dispose thereof in the same manner as of the property had the same not been sold.

Dated, etc.

Signature.

No. 100.

Notice of Levy on Property not Capable of Manual Delivery.

See ante p. 419.

[TITLE OF CAUSE.]

To E F:

Take notice, that by virtue of a warrant of attachment issued in this action, a certified copy of which is herewith served

upon and left with you, I have levied upon, and do hereby levy upon, your indebtedness, amounting to *ninety* dollars, or thereabouts, to the defendant above named (*describe as particularly as possible the property levied on*).

G W, Sheriff.

No. 101.

Certificate to be Indorsed on Copy of Attachments.

See ante p. 419.

I, G W, the within mentioned sheriff, do hereby certify that the within is a true copy of the warrant of attachment in my possession issued in this action, and of the whole thereof.

G W, Sheriff.

No. 102.

Order to Examine Third Person Holding Property.

See ante p. 419.

[TITLE OF CAUSE.]

It appearing to me by the certificate of G W, sheriff of the county of Rensselaer, that said sheriff, with a warrant of attachment against the property of C D, the above named defendant, has applied to O K for the purpose of levying on property of said defendant held by said O K, and that the said O K refused to furnish said sheriff with a certificate designating the amount and description of the property held by said O K for the benefit of the defendant.

I hereby order and direct the said O K to attend before me at my office in the city of Troy, on the fifth day of August, 1867, at ten o'clock in the forenoon, and be examined on oath concerning the same.

Signature of Judge.

Dated, etc.

No. 103.

Bond on Claiming an American Vessel.

See ante p. 429.

Know all men by these presents, that we, A B, shipmaster of the city of New York, C D, merchant of the same place, and E T, broker of the city of Brooklyn, are held and firmly bound unto the people of the state of New York, in the sum of *fifty thousand* dollars, for which payment will and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 9th day of July, 1867.

The condition of this obligation is such, that if the above named A B shall establish, in an action to be brought on this bond, that he was the owner of the steamer Kennebec (or the one-fourth share of the steamer Kennebec), heretofore seized under a warrant of attachment granted by D P, a justice of the supreme court, by the sheriff of the county of Kings, at the time of such seizure, or in case the said A B shall fail to establish such ownership on his part as aforesaid, if he shall pay on demand the sum of (*the valuation*), with interest from the date of the bond to the sheriff of the county of Kings, or in case the attachment aforesaid be discharged, to L M defendant, his executors, administrators, or assigns, then this obligation to be void, otherwise to remain in full force and virtue.

Signatures and seals.

Witness, etc.

Add justification and acknowledgment as in Nos. 11 and 12.

No. 104.

Order Discharging Vessel.

See ante p. 429.

[TITLE OF CAUSE.]

A warrant of attachment having been granted by me against the property of the defendant in this action, and the steamer Kennebec having been seized by the sheriff of the county of Kings, under and

by virtue of such warrant, which vessel is claimed by A B of the city of New York, as his property, and a sufficient bond having been given according to statute ;

Ordered, that the said steamer Kennebec be discharged from attachment under the warrant aforesaid, and that the said sheriff deliver the same to the said A B.

Signature.

Dated, etc.

No. 105.

Undertaking to Enable Plaintiff to Prosecute Actions.

See ante pp. 418, 442.

[TITLE OF CAUSE.]

Whereas, M N, sheriff of Albany county, has attached certain property of C D, the above named defendant, including three promissory notes made by H M, N L and R S, upon which it is intended to bring actions ;

And, whereas, the above named plaintiff desires to prosecute such actions himself, or to have them prosecuted under his direction ;

Now, therefore, we, A B, the said plaintiff, and J B, merchant, and O K, grocer, of the city of Troy, undertake in the sum of seven hundred and fifty dollars that the said A B will indemnify the said sheriff from all damages, costs and expenses on account of such actions, not exceeding the sum of two hundred and fifty dollars in any one action.

Signatures.

Add justification and acknowledgment as in Nos. 11 and 12.

No. 106.

Notice of Motion to Discharge Attachment.

See ante p. 444.

[TITLE OF CAUSE.]

Take notice, that on the annexed affidavit, and on the pleadings and proceedings in this action, I shall apply, at the next special term of this court, to be held in the City Hall, Albany, on the thirtieth

day of July, 1867, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order vacating and discharging the attachment issued in this action (*if for irregularity*), upon the ground that (*specifying it*), and for such other and further relief as may be just, with the costs of this motion.

Yours, etc.,

HIRAM T. SHARP,

Defendant's Attorney.

To E. L. Cole, Esq., Plaintiff's Attorney.

No. 107.

The Same, to Discharge on Security.

See ante p. 444.

[TITLE OF CAUSE.]

Take notice, that I shall apply at a special term of this court, to be held at the City Hall, Albany, on the thirtieth day of July next, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order discharging the attachment in this action, on giving security according to law.

Yours, etc.,

ROBLEY D. COOK,

Defendant's Attorney.

Jerome B. Parmenter, Plaintiff's Attorney.

No. 108.

Undertaking on Discharge of Attachment.

See ante p. 444.

[TITLE OF CAUSE.]

Whereas, the property of the above named C D has been attached by virtue of a warrant of attachment issued in this action; and the defendant desires a discharge of said attachment on giving security according to law.

Now therefore, we, J L of, etc., merchant and O K of, etc., broker,

do undertake, that if said attachment be discharged, we will on demand pay to the plaintiff the amount of judgment that may be recovered against the defendant in the said action, not exceeding the sum of *five hundred* dollars.

Signatures.

Dated, etc.

Add justification and acknowledgment as in Nos. 11 and 12.

No. 109.

Order Vacating Attachment on Motion.

See ante p. 444.

[TITLE OF CAUSE.] *Caption if at Term.*

On reading and filing the affidavit of C D above named, and notice of this motion, and after hearing J. M., counsel for the defendant, and D W, counsel for the plaintiff;

Ordered, that the attachment issued in this action on the third day of July, 1867, be and the same is hereby vacated and discharged; and it is further ordered that any and all proceeds of sales and moneys collected by the said sheriff, and all the property attached remaining in his hands, be paid and delivered by him to the said defendant or his agent, and released from the attachment, with ten dollars costs of this motion.

Signature.

Dated, etc.

No. 110.

Order Discharging on Security.

See ante p. 444.

[TITLE OF CAUSE.]

The defendant having appeared in this action, and having given the undertaking to pay the plaintiff's judgment, in pursuance of the statute;

Ordered (*conclude as in last form, omitting costs*).

No. 111.

*Execution where Sheriff who Executed the Attachment has
Gone Out of Office*

See ante p. 439.

The people of the state of New York;

To J B, late sheriff of the county of Rensselaer :

Whereas, by virtue of a warrant of attachment dated on the 3d day of May, 1867, issued out of our supreme court against the property of C D in an action pending in said court, wherein A B was plaintiff, and the said C D defendant, and delivered to J B, then sheriff of said county, the following property of the said C D, was on the 5th day of May, 1867, duly attached and taken into the custody of the said J B, to wit: (*Set forth the several items of property*), which property amounted in value to the sum of *five hundred* dollars, and

Whereas, judgment was rendered in said action on the 9th day of July, 1867, in favor of the said A B, against the said C D, for the sum of *four hundred and fifty* dollars, as appears to us by the judgment roll, filed in the office of the clerk of the county of Rensselaer, and whereas, the said judgment was docketed in your county on the said 9th day of July, 1867, and the sum of *four hundred and fifty* dollars is now actually due thereon;

Therefore, we command you that you satisfy the said judgment out of the property so attached, as aforesaid, by the sale of said property, or so much thereof as shall be sufficient to satisfy the said judgment, and return this execution, with your proceedings thereon, within sixty days after its receipt by you to the clerk of the county of Rensselaer.

Witness, Charles R. Ingalls, one the justices of our supreme court, at the city of Troy, on the 2d day of July, 1867.

R. D. Cook,
Plaintiff's Attorney.

CHAPTER V.

FORMS FOR RECEIVER.

No. 112.

Notice of Motion for Receiver.

See ante p. 407.

[TITLE OF CAUSE.]

Take notice that on (*here designate motion papers*) I shall move at a special term of this court, to be held in the City Hall, Albany, on the third day of September next, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order (that an injunction issue herein according to the prayer of the complaint, and) for the appointment of a receiver of the rents and profits of the estate of the defendant (or of all the partnership property and assets of the late firm of John Doe & Co.), mentioned in said complaint with the usual directions; and for such other and further relief as may be just, with costs of motion.

Yours, etc.,

FRANCIS RISING,

Dated, etc.

Plaintiff's Attorney.

To R. A. Parmenter, Esq., Defendant's Attorney.

No. 113.

Order to Show Cause against Appointment.

See ante p. 470.

[TITLE OF CAUSE.]

On the (*here designate papers*), let the defendant show cause on the first day of August, 1867, at ten o'clock in the forenoon, before this court, at a special term to be held in the Court House in

the city of Troy, on that day, why a receiver should not be appointed of the (*designate property briefly*), with the usual directions, and why such other relief should not be granted to the plaintiff as may be just, with costs of the motion.

Dated, etc.

Signature of Judge.

No. 114.

Order of Appointment by Court.

See ante p. 464.

[TITLE OF CAUSE.] *At a special term, etc.*

Upon the summons and complaint (*designate all motion papers*), and after hearing L M, counsel for the plaintiff and O K, counsel for the defendant;

Ordered, that E F of the town of Pittstown in the county of Rensselaer, farmer, be and hereby is appointed receiver of (*here designate property*); property of the above named defendant, upon the said E F's executing and filing with the clerk of this court a bond in the usual form, to the people of this state, in the penalty of *one thousand* dollars, with two sufficient sureties to be approved by a justice of this court, and that upon filing said bond as aforesaid said receiver be invested with all rights and powers as receiver according to law.

Dated, etc.

Signature.

No. 115.

Another Form. Partnership Case.

See ante pp. 464, 499.

[TITLE OF CAUSE.] *At a special term, etc.*

On reading and filing notice of motion for a receiver, summons, complaint and affidavit of Arthur Howe, and after hearing J. Kellogg, Esq., of counsel for the plaintiff and E. L. Fursman, of counsel for the defendant;*

Ordered, that Willard Gay, Esq., cashier of the National State

Bank of Troy, be, and he is hereby appointed receiver of the partnership stock, premises, outstanding debts and effects of the partnership (*or* late partnership) of the plaintiff and defendant herein, carried on in Troy, under the firm name of M N & Co., and in the pleadings in this action mentioned, upon executing and filing with the clerk of this court, a bond in the penal sum of fifty thousand dollars, with sufficient sureties to be approved by a justice of this court conditioned for the due and faithful performance of his trust; and that upon such bonds being executed, approved and filed, the said Willard Gay be vested with all rights and powers as receiver, according to law, and with power to collect, sue for and recover the debts and demands, that may be due to, and the property that may belong to said copartnership.

And it is hereby further ordered that the above named plaintiff and defendant as such copartners, do deliver over to such receiver, all and every the said partnership stock, premises, assets, outstanding debts and effects in their hands and in their possession or power or under their control, together with all books and papers relating thereto.

And the plaintiff and defendant are hereby restrained from receiving any debts due, or to become due to the said firm; and also from alienating, disposing of, or receiving any of the utensils, stock or property belonging to the trade or business of partnership.

And it is also ordered that the said receiver do, without delay, sell and turn into money, such parts of the copartnership estate and effects, as shall not consist of money, and that he pay (under the order of this court), the debts due, and to become due from the said partnership.

And further, that the said receiver, do, from time to time, annually pass his accounts, file inventories, and pay and deliver over such effects and balances as the rules, practice or court may direct.

Signature.

Dated, etc.

No. 116.

Order Appointing Receivers in Supplementary Proceedings.

See ante p. 515.

[TITLE OF CAUSE.]

On the examination of C D, the judgment debtor in the above entitled action, in pursuance of an order heretofore granted by me, in proceeding supplementary to execution (or on the report of R D, referee, to whom it was referred by me, to examine C D above named, in proceeding supplementary to execution, and the evidence on which such report is taken), and on motion of O K, counsel for the plaintiff, and after hearing H G counsel for the defendant ;

Ordered, that L M, of the city of Troy, be and he hereby is appointed receiver of the property, assets, equitable interests, rights, and things in action of the said C D, the judgment debtor ; that such receiver before entering on the execution of his trust, shall execute to the people of the state of New York, a bond, with sufficient sureties to be by me approved, in the penalty of four hundred dollars, conditioned for the faithful performance of his trust ; and it is further ordered that this order be filed in the office of the clerk of the county of, etc. (*where judgment roll is filed*), and that it be duly recorded by said clerk, as by law provided.

And further, that, from the time of filing of the said bond and the filing and recording of the said order, the said receiver be vested with the property and effects of the judgment debtor and with all the rights and powers of receivers according to law.

[That when so appointed, the said receiver shall have power to sue for and collect all debts, demands and rents belonging to the defendant, and to compromise and settle such as are unsafe, or of a doubtful character. He may sue in the name of the debtor, where necessary or proper for him to do so, but the said receiver will not, in his accounts, be allowed for the cost of any action brought by him against an insolvent from whom he is unable to collect his costs, unless such action is brought by order of the court, or by the consent of all persons interested in the funds in his hands ; and the tenants of the real estate of the said defendant are to attorn to such receiver or the latter may, when necessary, apply for and obtain an

order that any of such tenants attorn and pay rents to him ; he may make leases, from time to time, as may be necessary, for terms not exceeding one year. He shall also, without unreasonable delay to convert all the personal estate and effects of the said C D, into money ; but he shall not sell any real estate of the said judgment debtor, without the special order of the court. He may, by leave of the court, sell such desperate debts and all other doubtful claims to personal property, at public auction, giving at least ten days' public notice of the time and place of such sale.] And I further order that the sum of twenty dollars be allowed to the plaintiff for costs of this proceeding ; and that the said C D be and he hereby is restrained from making any disposition of, or interfering with his property until further ordered.

Signature.

The part inclosed in brackets is the gist of Rule 92, and, though not essential, had better be inserted.

No. 117.

Order of Reference to Appoint.

See ante p. 464.

[*As in No. 115 to * continuing :*] Ordered, that it be referred to Robley D. Cook, Esq., as referee, to appoint a proper person to be receiver of the partnership stock, premises, outstanding debts and effects of the partnership (*or* late partnership) of the said plaintiff and defendant carried on in the city of Troy, under the style of C. F. Shutts & Co., and in the pleadings in this action mentioned ; such person to be appointed receiver, first giving security, to be approved by the said referee, to be answerable for what he shall receive, duly file inventories and to truly and faithfully perform the duties of his trust. And it is hereby ordered that the said referee be at liberty to examine said plaintiff and defendant A N B and C D as to the copartnership stock, premises, goods, credits and effects in their possession or under their control ; and that they do under the direction of the said referee, and on oath, if required, deliver over to such person, so to be appointed receiver, all and every the said co-

partnership stock, premises, chattels and effects, together with all books and papers relating thereto.

And the plaintiff and defendant are hereby restrained from collecting, receiving, alienating, disposing, or in any manner, interfering with any of the said property or effects.

And further, that the person so to be appointed receiver, do, without delay, sell and convert into money such parts of the said copartnership effects and assets as shall not consist of money.

That he pay the debts due and to become due from the partnership, and that he, from time to time, annually, pass his accounts, file inventories and pay and deliver over such effects and balances as the rules, practice or court may direct.

No. 118.

Same—Short Form.

See ante p. 464.

[*As in No. 115 to "Ordered" continuing:*] That it be referred to G H Esq., of, etc., counsellor at law, to appoint a receiver of etc. (*particularly specify property*).

That said referee take from such receiver the necessary and usual security for the faithful performance of his trust, and file the same in the office of the clerk of this court; and that upon the filing of such security, and of the said referee's report, such receiver shall be vested with the usual powers and rights of receivers, according to the statutes, and the rules and practice of this court (*specify any peculiar power*).

No. 119.

Summons to Attend Reference.

See ante p. 464.

[TITLE OF CAUSE.]

To (*defendant or his attorney*).

You are hereby summoned and required to attend before R D, the referee appointed by the court to appoint a receiver in this

action, at his office, No. 53 Congress street, in the city of Troy, on the third day of September next, at three o'clock in the afternoon, where he will receive proposals for a receiver under an order of the court, dated July twenty-fifth, a copy of which has been served on you.

(*When it is desired to examine the defendant add:*) And the personal attendance and examination of the defendant, C D, is required.

R. D. COOK, Referee.

Dated.

Moses Warren, Plaintiff's Attorney.

No. 120.

Proposal for Receiver.

See ante p. 464.

[TITLE OF CAUSE.]

Proposal of the above named plaintiff (*or defendant*) for a receiver of the estate, etc. (*following order*), pursuant to the order of this court dated the third day of July, 1867.

The plaintiff (*or defendant*) proposes A G of, etc., as such receiver.

And the said A G proposes W M of, etc., and O K of, etc., to be his sureties.

C E, Plaintiff's Attorney.

No. 121.

Referee's Report of Appointment.

See ante p. 464.

[TITLE OF CAUSE.]

To the supreme court of the state of New York :

In pursuance of an order of this court made in the above entitled action by, etc., bearing date the 3d day of June, 1867, whereby it was referred to the undersigned to appoint a receiver in this cause of, etc. (*designate property per order*), and to take from the said

receiver the requisite security, I, the referee in said order named do report : That I have been attended on the said reference by the counsel of both parties, that I thereupon proceeded on the matter so referred. That A B of the city of New York, was proposed on the part of the plaintiff, to be the receiver in this cause, and no objection being made to his appointment, and deeming him a fit and proper person for such trust, I have appointed him to be such receiver. That the said A B thereupon executed a bond in the usual form to the people of the state of New York, in the penal sum of..... dollars, conditioned for the faithful discharge of his duties as such receiver.

That O K and M N of the city of Troy, were proposed as the sureties of the said receiver, and being satisfied by their affidavit of justification that they were each worth the requisite amount, and were freeholders (or householders), I approved of the said sureties as sufficient, and the said sureties thereupon executed the said bond jointly with the said receiver. And I further report, that I have caused the said bond, with my approval indorsed thereon, and the said affidavits of justification, to be filed in the office of the clerk of this court.

All which is respectfully submitted.

Dated Troy, June 7, 1867.

WILLIAM H. SCHOOLEY,
Referee.

No. 122.

Order of Reference to Report Receiver.

See ante p. 464.

[*Commencement and recital as in No 115 continuing :*] Ordered that a receiver be appointed of the (*specified property*), that it be and hereby is, referred to R D of, etc., counsellor at law, to report a suitable person to be appointed such receiver, and to report the names of sureties proposed by him, with the amount for which they should be liable, and their responsibility for the same.

Signature.

Dated, etc.

No. 123.

Referee's Report of Names.

(*This report should be similar to that under No. 21 with a few slight changes*).

No. 124.

Order Confirming Referee's Report of Names.

See ante p. 464.

[TITLE OF CAUSE.] (*At a special term, etc*).

On reading and filing the report of R D, a referee appointed by this court to report the name of a person, suitable for a receiver in this action, and as to what security should be required, and on motion of A P, counsel for the plaintiff and after hearing, etc. ;

Ordered, that the said report be and hereby is in all things confirmed, and that R C be appointed the receiver of (*here designate property*) and that A B and M N, the sureties named in said report be approved as sureties for the said receiver, and that the bond heretofore approved by the referee, be filed with the clerk of the county of Rensselaer, and that from the date of the filing of said bond, said receiver have all the rights and powers of receivers according to law (*add any special powers or directions*).

Signature.

No. 125.

Receiver's Bond.

See ante p. 464.

Know all men by these presents, that we, A B of, etc., O K of, etc., and M N of, etc., are held and firmly bound unto the people of the state of New York in the sum of, to be paid to the said people of the state of New York. For which payment well and truly to be made we bind ourselves and our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed with our seals, dated the 3d day of May, 1867.

Whereas, by an order of this court bearing date the, etc., wherein A B is plaintiff, and C D, defendant, it was ordered that it should be referred, etc. (*here give order*), and whereas the said referee has appointed the above named A B as such receiver ;

Now therefore, the conditions of this bond is, such that if the above named bounden A B shall well and truly perform the duties of his trust, and shall, under the rules and practice of the court, duly file his inventory, and annually or oftener, if thereunto required, duly account for what he shall receive or have in charge as receiver in the said cause, and pay and apply what he shall receive or have in charge, as he may from time to time be directed or ordered by the court, and do and perform his office of receiver in all things according to the true intent and meaning of the aforesaid order, then this obligation to be void, otherwise to be of full force and virtue.

Signatures and Seals.

Witness.

Add justification and acknowledgment as in Nos. 11 and 12.

No. 126.

Petition for Leave to Sue.

See ante p. 480.

[TITLE OF CAUSE.] . . .

To the supreme court, etc.

The petition of R D, the receiver in the above entitled cause, respectfully sheweth: That on the third day, etc., your petitioner was, by an order of this court, duly appointed receiver of, etc. That your petitioner gave the requisite bond, with sufficient sureties, which has been duly approved and filed in the office of the clerk of this court; that your petitioner has entered upon the execution of his trust; that among other book debts embraced by his said trust is a book debt of ... dollars due from H D of, etc., and the particulars of which are more fully set forth in the schedule annexed hereto; that your petitioner, as such receiver, has frequently, both personally and by letter, demanded payment of said debt, but has always been met by evasive answers, and the debt still remains due and

unpaid ; * that your petitioner has made diligent inquiry concerning the pecuniary responsibility of H D, and from such inquiry, has reason to believe and does believe, that the said debt would be likely to become available by an action ; that from all the information obtained, he believes said H D to be solvent, and abundantly able to pay the said debt.

Your petitioner, therefore, prays for an order allowing your petitioner, as such receiver, to commence, continue and perfect an action, in the supreme court of this state, against the said H D, for the recovery of said book debt of ...dollars, and in such form of action as counsel may advise.

And your petitioner will ever pray.

Sworn, etc.

Signature.

No. 127.

Order to Sue.

See ante p. 480.

[TITLE OF CAUSE.] *At a special term, etc.*

On reading and filing the petition of A B, receiver in this action, asking leave to bring an action for, etc., and on motion of J R, counsel for said receiver, ordered that the said A B, be, and hereby is, authorized and empowered to commence, continue and perfect an action in the supreme court, in such form as counsel may advise against the said H D, to recover the said, etc.

Signature.

Dated, etc.

No. 128.

Petition to Sell Bad Debts.

See ante p. 480.

[*As in No. 126 to * continuing:*] that your petitioner has made diligent inquiry concerning the pecuniary responsibility of the said H D, and that from such inquiries your petitioner believes that he is insolvent and that all and every said debts and notes are despe-

rate or bad, and that it is not advisable to risk the expense of costs in bringing action to recover any one of them, but that it will be better to sell the same, and all benefit that may arise therefrom.

Your petitioner, therefore, prays for an order allowing and authorizing your petitioner, as such receiver, to sell all and every the said notes and debts by public auction or private sale, that is to say, etc. (*here designate debts, etc.*), and for such further or other order as the court may grant.

And your, etc.

Signature.

Sworn, etc.

No. 129.

Order to Sell Bad Debts.

See ante p. 480.

[*Recite formal part as in No. 127, continuing:*] Ordered, that the said A B, as such receiver, do, and he is hereby authorized and allowed to sell at public auction at, etc., all and every the said bonds, notes and book debts mentioned in said petition, to wit, etc. (*describe them*), and it is also ordered that the said sale shall be for cash, and that said receiver shall give at least fourteen days' notice of the said sale, by publishing the same for *two weeks* in one or more newspapers printed and issued in the *city of Troy*. And the purchaser or assignees of such debts will, by virtue of this order be authorized to sue for and collect the same in like manner as the receiver might have done.

Signature.

Dated, etc.

No. 130.

Petition by Receiver to Pass his Accounts and be Discharged.

See ante p. 480.

[TITLE OF CAUSE.]

To the supreme court, etc.

The petition of A B, receiver in the above cause, sheweth, that by an order of this court made on the third day, etc., it was ordered

that it be referred to R D, a referee residing, etc., to appoint (*here recite the order to appoint*).

That in pursuance of said order, the said referee by his report, bearing date, etc., duly appointed your petitioner to be such receiver, who, thereupon, with N O and O K, his two sureties; entered into the recognizance usual in such case, and took upon himself the duties of said receivership. That your petitioner has filed his inventories and annual accounts in strict and full conformity with the rules and practice of the court. That the purposes for which your petitioner was appointed as such receiver have been answered and the duties of his office, save accounting and being discharged, are at an end, in consequence of, etc. (*here state the cause of the termination*); that your petitioner, is, therefore, desirous of passing his accounts, paying in any balance, being discharged, and having his sureties' recognizance vacated.

Your petitioner therefore prays that your honor will grant an order that your petitioner A B, as receiver in this cause, do pass his accounts, from the time of his appointment up to the period of receiving and paying the last item, before a referee residing in the city of Troy, and so as therein to be allowed all just and proper costs, charges, fees, allowances, commissions and expenses, and pay into court, to the credit of such action, the amount of balance in hand as the same may be certified by the said referee. And also that, on such payment being made the recognizance entered into by the said A B with N O and O K, his sureties, be vacated, or for such other or further relief as the court may deem just.

And your petitioner will, etc.

Signature.

Sworn, etc.

No. 131.

Order of Reference Thereon.

See ante p. 480.

[TITLE OF CAUSE.] *At a special term, etc.*

On reading and filing the petition of A B, the receiver in this action, whereby it appears that (*recite briefly the substance of above*

petition), and on reading and filing due proof of service of the said petitioner, etc., and after hearing R H, counsel for said receiver, and also M H, counsel for, etc.;

Ordered, that A B, the said receiver, do pass his accounts as such receiver before J B of K, as referee, appointed for that purpose, and so as to embrace the whole of his receivership, and commence from the time of his appointment, and with that view, that the said A B, is to produce all necessary books, papers and vouchers before the said referee and (*if there is real estate*) he is to reconvey the real estate heretofore conveyed to him, to the said C D, defendant under the direction of the said referee.

And it is further ordered, that the said A B be allowed by the said referee on such accounting, all just costs, charges, fees, expenses, allowances and commissions, as well as all proper taxes, costs payments, and referee's fees of the reference to account and be discharged and vacate recognizance, and that the said receiver do pay what the said referee shall certify to be due from the said A B on the balance of such account within a time to be specified by the said referee in his report, to the clerk of the county of Rensselaer to the credit of this cause. And on filing the said referee's report showing that the said receiver has duly passed his accounts, and on such payment being made (*and such reconveyance executed*), it is ordered that the said A B be forever discharged as such receiver, and that the recognizance entered into by the said A B, and N O, and O K, sureties, be vacated and the clerk shall thereupon cancel the said recognizance.

And the said referee, before beginning the matter of this referee, shall have proof that all necessary and proper persons have been duly summoned to appear before him on such reference. And the said receiver is also ordered, after he shall have passed his accounts, to deliver over and deposit with this court, all books, papers and vouchers in his possession relating to the said estate.

Signatures.

Dated, etc.

No. 132.

Referee's Report Thereon.

See ante p. 480.

[TITLE OF CAUSE.]

To the supreme, etc.

In pursuance of an order made in the above action, bearing date the, etc., whereby etc. (*here briefly give substance of order of reference*). I, the undersigned, referee aforesaid do hereby respectfully report that I have been attended by A B, the receiver in said action and the counsel for the respective parties; and the said receiver having brought in before me his accounts, embracing the whole of his receiverships from first to last; I have in the presence of the said receiver and also in the presence of the counsel for the plaintiff and defendant, proceeded to take and pass the said accounts; and I affirm that the said receiver hath received etc., etc., etc. (*take first yearly account*); and that he has paid and is also to be allowed for taxes and for his commissions or salary as receiver during said year, 18... .. dollars; that he hath received etc., etc. (*same as above with each year's account, allowing in the last for the costs of passing account and show balance*), which is the clear balance remaining in the said receiver's hands and to be paid into this court. And in pursuance of the aforesaid order, I hereby specify days within which the said balance shall be paid in by the said receiver to the credit of this action.

All which I respectfully submit.

Dated, etc.

Signature.

No. 133.

Receivers of Corporation.

See ante p. 537.

I have not deemed it necessary to insert forms for receivers in proceedings against corporations in equity, since they would be of little practical use, unconnected with the other forms required by

the different steps in such proceedings. For such forms, see the admirable work of Mr. Edwards on Receivers; also the appendix to Crary's New York Practice.

No. 134.

Order to Deliver Property into Court.

See ante p. 557.

[TITLE OF CAUSE.] *At a special term, etc.*

On the pleading (or examination) of the above named defendant, whereby it is admitted that such defendant has in his possession (or under his control) the property hereinafter mentioned, which is the subject of litigation in this action, and which is held by him as trustee for the *plaintiff* (or which belongs to the plaintiff) (or which is due to the plaintiff) and on reading and filing proof of due service of notice of this motion, and after hearing J M, counsel, etc., and M N counsel etc., in opposition thereto ;

Ordered, that the defendant, C D, within days after the service on him of this order, deposit in court the following property, to wit, etc. (*specify property*), subject to the further direction of the court (or deliver to the plaintiff the following property to wit, etc.).

Signature.

Dated, etc.

No. 135.

Order to Satisfy Admitted Part of Plaintiff's Claim.

See ante p. 561.

[TITLE OF CAUSE.] *At a special term, etc.*

On the defendant's answer in this action, whereby it appears that such defendant admits part of plaintiff's claim, to wit: (*state part admitted*) to be just, and after hearing E F, counsel, etc., and M O, counsel, etc. (*or on reading and filing proof of due service of notice of this motion, and no one appearing*) in opposition thereto ;

Ordered, that the defendant satisfy such part of said claim, by paying to such plaintiff within days after the service of this order on him, the sum of dollars, with interest thereon from the day of 18..., with ten dollars, costs of this motion, and that the plaintiff have leave to issue execution against the property of the defendant for the same if not so paid.

Signature.

Dated, etc.

CHAPTER VI.

FORMS FOR NE EXEAT.

No. 136.

Affidavit for Ne Exeat.

See ante p. 567.

[TITLE OF CAUSE.]

Rensselaer County, ss :

A. B. being duly sworn, says that he has a cause of action against the above named defendant founded on the following facts : (*set forth cause of action*) and that this defendant has commenced (*or is about to commence*) an action thereon. That, etc. (*state briefly condition of action*).

That the said C D has declared his intention to leave the state speedily and go abroad (*set forth carefully the facts as to intended departure*).

And this deponent verily believes, that if the said C D should be suffered to leave the state, this deponent will either lose his said debt, or the same will be greatly endangered, and that it will be difficult if not impossible, for this deponent to recover the same.

A B.

Sworn, etc.

No. 137.

Writ of Ne Exeat.

See ante p. 567.

The people of the state of New York :

To the sheriff of the county of Rensselaer.

Whereas, it appears to us in our supreme court, that C D is greatly indebted to A B on an equitable demand for, etc. (*state*

demand briefly), and that the said A B has commenced an action, in our said court, against the said C D, thereon, which said action is now pending and undetermined, and whereas, it further appears that the said C D designs quickly to go into parts without this state, as by oath made on that behalf appears, which tends to the great prejudice and damage of the said plaintiff.

Therefore, in order to prevent this injustice, we hereby command you, that, without delay, you cause the said C D, to come personally before you, and give sufficient bail or security in the sum of dollars, that he, the said C D will not go, nor attempt to go, into parts without this state, without leave of our said court. And in case the said C D shall refuse to give such bail or security, then you are to commit him to the common jail of your county, there to be kept in safe custody until he shall do it of his own accord; and when you have taken such security, or made such commitment, you are forthwith to make and return a certificate thereof to our said court, distinctly and plainly under your hand, together with this writ.

Witness, the Hon. R W P, one of the justices of our said court, at the, etc., this day of, 18...

Signature of Clerk.

J B P., Plaintiff's Attorney.

No. 138.

Indorsement Thereon.

See ante p. 567.

By special order of the court hold the defendant to bail in the sum of dollars.

Signature of Clerk.

I allow the within writ.

J D, Justice Sup. Court.

No. 139.

Order of Ne Exeat.

See ante p. 567.

[TITLE OF CAUSE.]

On reading and filing the affidavit of A B, the plaintiff herein, and on motion of R D, counsel for said plaintiff;

Ordered, That the defendant C D, do within ... days after service of this order give security in the sum of ... dollars with proper sureties to be approved by a judge of this court, not to depart from this state, without appearing in this action and performing such order or decree as shall hereafter be awarded by this court; otherwise an attachment to issue without further notice.

Dated, etc.

Signature.

The above is said to be substantially the form used in the English court of Exchequer. See 1 Til. & Sher. Prac. 618.

No. 140.

Bond to Sheriff.

See ante p. 567.

Know all men by these presents, that we, C D of, etc., M N of, etc., and O K of, etc., are held and firmly bound unto G C, sheriff of the county of Rensselaer, in the sum of dollars, to be paid to the said G C, his heirs, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seal, and dated the day of, 18....

Whereas, the above named C D has been arrested upon a writ of *ne exeat*, issued out of the supreme court of the state of New

York, in an action therein pending, wherein A B is plaintiff and the said C D, defendant, and is now in custody of the said sheriff by virtue thereof.

Now the condition of this obligation is such that if the said C D shall not go nor attempt to go, without the state without leave of the said supreme court, then this obligation to be void, otherwise to remain in full force and virtue.

Signatures and Seals.

Signed, etc.

Justification and acknowledgment as in Nos. 11 and 12.

INDEX.

ABATEMENT

- of action, of claim and delivery, 167, 191.
- of injunction by death of party, 339.

ABSCONDING

- and concealed debtors. (*See Debtors*).

ACTION

- for recovery of property, arrest in, 36-39.
- against bail, when, 108.
 - defense of, 108, 109.
- against sheriff for an escape, 116.
- injunction of, 269, 271.
 - in another court, 272.
 - in another state, 274, 275.
 - in United States court, 276.
 - to foreclose mortgage, 273.
 - by receiver, 274.
 - for possession of land, 277.
 - security on, 270, 271.
 - effect of, 276.
 - on limitation of, 279.
 - of proceeding in violation of, 273.
- creditors, when injunction granted in, 280.
- for separation from bed and board, when injunction granted in, 307.
- to try title to office when injunction granted in, 308.
- in what actions attachment granted, 350.
- when plaintiff in attachment suit may maintain, 442.
- of ejectment by or against receiver, 488.
- receiver not to bring, without leave, 490.
- in the name of receiver, when, 490.
- what receiver must show to maintain, 490.

ACTION (*Continued*).

- receiver may bring to set aside fraudulent conveyance, 492.
 - may maintain in another state, 493.
 - not to defend without leave, 493.
- against receiver must be by leave of court, 493.
- when receiver appointed in, to foreclose mortgage, 506, 507.
 - for real property, 507.
 - for partition, 508.
 - for construction of will, 508.
 - for specific performance, 508.
- creditors'. (*See Creditors' Suit*).

ACCOUNT

- receiver to render annually, 494.
- final, of receiver, 496.
- in action for, when *ne exeat* granted, 568.

ADVERSE USER

(*See Prescription*).

ADMINISTRATORS

- when enjoined, 307.
- cannot be attached, 372.
- when may be superseded by receiver, 504.
- when ordered to deposit fund in court, 558.

AFFIDAVIT

- for order of arrest, 57.
 - how facts to be set forth in, 57.
 - facts to be positively stated in, 58.
 - when should not be entitled, 58.
 - when name of defendant is unknown, 59, 67.
 - when complaint may be used as, 59.
 - may charge intent in alternative, 60.
 - when examination of judgment debtor may be used as, 60.
 - form of, for fraud in contracting debt, 60.
 - in action for false imprisonment, 61.
 - to procure arrest for fraudulent disposal of property, 62.
 - for arrest in action of *crim. con.*, 62.
 - how non-residents or intended departure alleged in, 62.
 - how title of married women alleged in, 62.
 - when giving bail, waives defects in, 62, 125.
 - when sheriff to file, 62.

AFFIDAVIT (*Continued*).

- for order of arrest, copy of, to be delivered to defendant, 70, 71.
 - effect of omitting in copy of, name of affiant, 71.
- of justification, what to state, 92.
- on motion to vacate order of arrest, 122 - 133.
- in action of claim and delivery, 169.
 - who may make, 169.
 - when should not be entitled, 170.
 - facts, how stated in, 170 - 172.
 - property, how described, 170, 171.
 - may be controverted by defendant, 172.
 - amendment of, 172, 191.
 - requisition to be indorsed on, 173.
- for injunction, what to state, 317.
 - when complaint may be used as, 317, 318.
 - by whom may be made, 318.
 - against removal of property, 315.
 - must state facts positively, 319.
 - to be served with injunction, 319.
 - to be filed, 319.
- on motion to dissolve injunction, 337.
 - copies of, to be served, 338.
 - on behalf of plaintiff, 338.
 - to oppose answer, 338.
- for attachment, 375.
 - facts in, how stated, 376 - 378.
 - when to be entitled, 379.
 - by whom made, 379.
 - sufficiency of, not jurisdictional question, 379.
 - amendment of, 379.
 - when to be filed, 379.
- on motion to discharge attachment, 444.
- for *ne exeat*, what to contain, 571.

AGENT

- of corporation or banking association, arrest of, 28.
- arrest of, for money received in a fiduciary capacity, 28 - 34.
- fraud of, when principal liable for, 45.
- contracting without authority, 48.
- when bound to obey injunction, 201.
- injunction against, 306.
- bail may appoint to seize defendant, 106.
- receiver may appoint, 482 - 525.

AGREEMENTS

- in court enforced by injunction, 254.
- breach of, enjoined, 256. .

ALIMONY

- injunction in action for, 307.

ALLOWANCE

- of bail, how made, 100.
 - when conclusive, 101.
 - when will be set aside for fraud, 101.
- extra, how obtained in attachment suits, 460.

AMENDMENT

- of undertaking of bail, 94.
- of affidavit in claim and delivery, 172, 191.
- of affidavits for attachments, 379.
- of warrant of attachment, 388.

APPEAL

- from motion vacating order of arrest, 132.
- bail liable for cost on, 110.
- effect of, on injunction, 339.
- from an order dissolving injunction, 339.

ARREST

- no person subject to, except as provided, 10. .
- similarity of, to old practice, 10.
- how law of to be construed, 11.
- discretion of court in granting order of, 11.
- liability to, must be personal, 11.
- at suit of assignees, 12.
- when may be renewed, 14.
- non-resident may have remedy of, 15.
- in what cases may be had, 16.
- when may be had under sub 1, § 179, 17.
- in actions not rising out of contract, 17.
- of non-residents, 18.
- where defendant is about to move from the state, 20.
- for injury to person or character, 20.
- in actions for *crim. con.*, seduction, etc., 20.
 - for divorce, 21.
 - for false imprisonment, etc., 21.
 - for assault and battery, 21.
 - for injury to character, 21.
 - for injuring, taking or converting property, 22, 23.
 - for detaining real estate, 22.

ARREST (*Continued*).

- in actions against innkeeper, 23.
- for fraud in foreign country, 24.
- under sub 2, § 179, 25.
- of public officers of foreign government, 26.
- of attorneys, solicitors and counsellors, 26, 27.
- of officers or agents of corporations or banking associations, 28.
- of agents, etc., for money received in fiduciary capacity, 28 - 34.
- of commission merchants, 29 - 31.
- in actions on judgment, 34.
- for professional misconduct, 35.
- for concealing, removing or disposing of property, 36 - 39.
- for fraud in contracting debt, etc., 40 - 56.
- of principal for fraud of agent, 45.
- of partners for fraud of one partner, 45, 46.
- for fraud or deceit, 46 - 48.
- females when liable to, 24, 25, 35, 39, 50, 55, 56, 78.
- for fraudulent removal, etc., of property, 51 - 55.
- married women not liable to, 56.
- of defendant in action of claim and delivery, 36 - 39, 192.
- and attachment may be had in same action, 373.
- assignment constructively fraudulent, not ground for, 368.
- on execution, 134. (*See Execution*).
- affidavit to obtain order of, how drawn, 57 - 62.
- security by plaintiff, on procuring order of, 63 - 65.
- order of, by whom made, and its form, 66 - 69.
- when and how made, 70 - 88.
- by whom may be made, 92.
- who are privileged from, 72 - 79.
- where may be made, 80.
- when officer may enter dwelling to make, 80.
- how made, 83, 84.
- detaining defendant on subsequent process of, 84.
- copies of affidavit and order of, to be served, 85.
- who are exempt from, 72. (*See Privilege from Arrest*).

ASSESSMENT

- of damages from injunction, 341. (*See Damages*).
- of taxes when enjoined, 250, 251, 310.
- erroneous, how corrected, 250, 251, 310.

ASSIGNMENT

- of cause of action does not affect arrest, 12.
- what causes of action subject to, 12.
- when threat to make, ground for attachment, 367.

ASSIGNMENT (*Continued*).

- if fraudulent, attachment may issue, 368.
- where constructively fraudulent, 368.
- when a fraudulent disposal of property, 52-54.

ASSIGNEE

- may have order of arrest, 12.
 - attachment, 352.
- when enjoined, 306.

ASSAULT AND BATTERY

- arrest for, 21.

ATTACHMENT

- in what cases granted, 348.
- at what time granted, 373, 386.
- in what actions granted, 350.
- nature of the remedy of, 349.
- how it differs from those under Revised Statutes, 349.
- not granted for equitable debts, 351.
- debt must be due, 351.
- where debt is secured, not granted, 352.
- who may have, 352.
 - non-resident plaintiff, 352.
 - assignee of claim, 352, 353.
- against foreign corporations, 353.
- how foreign character of corporation determined, 352.
- on claim assigned to resident by non-resident, 354.
- when proof of residence, etc., must be made, 354.
- against non-residents, 354.
- as to who are non-residents. (*See Residence*).
- against concealed or absconding debtors, 361-365.
 - debtors removing property, 365.
- removal of what property will justify, 365, 369.
- intent, how proved, 366, 369.
- against debtors disposing of property, 366.
- threat to assign, when will justify, 367.
- where assignment is made, 368.
- omission in deed will not justify, 369.
- affidavit for, must be positive, 370.
- where one joint debtor absconds or is non-resident, 371.
- against partner, 371.
 - executors, trustees, etc., 372.
- may be had with arrest, 373.
- in actions commenced by publication, 373.
- affidavit for, how drawn, etc., 375.

ATTACHMENT (*Continued*).

- undertaking of plaintiff for, 381.
- warrant of, by whom and how granted, 385, 386.
- when county judge may grant, 385.
- judge related to either party cannot grant, 386.
- warrant of, to whom directed and what to contain, 386, 387.
- several warrants, when issued, 387,
- formal defects in, amendable, 388.
- what property subject to, 389 – 398.
- of deposit made on arrest, 104.
- of goods *in transitu*, 393.
 - sold conditionally, 393.
 - fraudulently obtained, 393.
 - in possession of one having lien, 393, 436.
- of property in custody of law, 394.
- of mortgagor's interest in chattels, 395.
- of mortgaged goods, 395.
- of a contingent interest, 395.
- of partnership property, 396.
- of proceeds of assigned property, 397.
- of bond of foreign corporation, 397.
- of property in possession of one claiming title, 398.
- of real property, 398.
- how warrant of, executed, 399.
- of exempt property, 402.
- how much property to be seized on, 402, 404.
- powers and duties of sheriff in executing, 399 – 418.
- how executed on property incapable of manual delivery, 419.
- effect of, 433.
- as to priority of, 433.
- judgment on, how satisfied, 437.
- discharge of, 444 – 455.
- when sheriff to return warrant, 456.
- sheriff's fees on, 456 – 460.
- costs and allowances on, 460.

ATTORNEY

- cannot be bail, 93.
- arrest of, for money collected, etc., 26.
- non-resident, may be arrested, 26.
- not liable till after demand, 26.
- presumed to have received money in official capacity, 27.
- liability of, to arrest for fraud of partner, 27.
 - for fraud of agent, 28.

ATTORNEY (*Continued*).

- when guilty of professional misconduct, 28.
- when privileged from arrest, 75.
- duty of, on obtaining order of arrest, 70, 71.
- restrained from divulging privileged communications, 307.
- to obey injunctions, 201-306.
- when liable for sheriff's fees on attachment, 459.
- when cannot be appointed receiver, 467.
- of receiver, who may be, 485.
- general, when to bring action to dissolve corporation, 539.

BAIL

- when may be given, 90.
 - before arrest, 90, 91.
- how given, 89-94.
- giving, waives defects in affidavits, 62.
- amount of, to be specified in order of arrest, 66, 68.
- what the amount should be, 68, 92.
- qualifications of, 89, 91, 92, 100.
- who cannot be, 92-94.
- undertaking of, to be acknowledged, 94.
 - where not sufficient, 94.
 - sheriff to deliver certified copy of, to plaintiff, 94, 95.
 - how disposed of, 94.
- for arrest under sub 3, § 179, 90.
- sheriff in taking, to follow statute strictly, 91.
- how many sureties required, 89.
- when more than two may justify in less amount, 92.
- how to justify. (*See Justification of Bail*).
- allowance of, how made and its effect, 100, 101.
- deposit instead of. (*See Deposit*).
- surrender of defendant, when, 105, 110.
 - how made, 105, 107.
 - within what time, 107, 108.
- how proceeded against, 108.
- when liable, 108.
- what may show in defense of action against, 108, 109.
- cannot question defendant's liability to arrest, 109.
 - set up defendant's privilege from arrest, 109.
- may defend suit against principal, 109.
- liable for costs on appeal, 110.
- when may be exonerated, 105, 111.
- how exonerated. (*See Exoneration of Bail*).
- sheriff, when liable as, 116.

BAIL (*Continued*).

- sheriff, when liable as, may put in, 116.
- when liable to sheriff, 121.
- motion to reduce, 131.
- supersedeas, when and how granted, 138.
- must be exonerated before motion for supersedeas, 139.

BANKING

- association, arrest of officers of, 28.
- corporation. (*See Corporations*).

BOND

- for jail liberties, when and how given, 86.
- of receiver, form and execution of, 477.
 - to be filed, 477.
 - in supplementary proceedings, 521, 522.
- to discharge *no exeat*, 574.

BREACH

- of promise to marry, female not arrestable for, 25.
- of covenants relating to real property, when enjoined, 241.
- of building covenant, when enjoined, 244.
- of covenant in lease, when enjoined, 242.
- of contract in restraint of trade, enjoined, 252.
- of covenant in articles of copartnership, how restrained, 253.
- of contracts for exclusive service, when enjoined, 254.

BRIDGE

- restraining erection of, 248.
- when legislative authority necessary to build, 248.
- when building of, will not be enjoined, 249.

BROKER

- arrest of, for money received in fiduciary capacity, 28, 29.

BUILDING

- property concealed in, how taken, 177.
- when sheriff may break into, on attachment, 406-409.
 - to make arrest, 80.
- covenants, when enforced by injunction, 244.
- when tenants may remove, 160-162.

CANAL OFFICERS

- when privileged from arrest, 75.

CAUSE OF ACTION,

- when may be assigned, 12.

CERTIORARI

- to correct assessments, 250, 310.

CHARACTER

arrest for injury to, 21.

CHURCH;

when trustees of, enjoined from altering, etc., 234.

CLAIM AND DELIVERY

arrest of defendant in action of, 36 - 39.

order for, 39.

undertaking of bail on, 90.

action of, when may be had, 141.

nature of, 142.

object of, 143.

where defendant offers to return property, 143.

time for obtaining remedy, 143.

what title plaintiff must show, 144, 156.

plea of property in stranger, 145, 156.

who may have the remedy, 145.

one partner cannot have against copartner, 146, 155.

nor one tenant in common against cotenant, 146, 155.

when the action lies, 146, 151.

against defendant who has disposed of property, 146.

against a purchaser in good faith, 146, 147, 152.

for a wrongful taking, 147.

against officer for goods levied on, 147, 148.

plaintiff who directs unauthorized levy, 148.

fraudulent purchaser, 148, 149.

vendee who has mortgaged property fraudulently purchased, 149.

vendee who has sold property to pay prior debts, 149.

by mortgagee of chattels, 149.

by one having lien on property, 150.

for goods sold conditionally, 150.

against person receiving goods sold conditionally, 150, 151.

for unlawful detention, 151.

against defendant who has parted with goods before suit, 151.

against executors and administrators, 152.

for property taken on execution, 153, 154.

for property taken by replevin, 155.

demand, when to be made, 151.

CLAIM AND DELIVERY (*Continued*).

- does not lie for property taken for tax, assessment or fine, 152, 153.
 - on attachment or execution, 152, 153.
 - between partners, 155.
 - tenants in common, 155.
 - at common law against corporations, 155.
 - between persons having separate interest in property, 155.
 - when title is in third person, 156.
 - by lessor before expiration of lease, 156.
 - owner for goods in possession of factor having lien, 156.
- for what property action lies, 157.
 - for fixtures after severance, 157, 162.
 - what articles are personal property, 157-163.
 - where property is confused, 163.
- form of verdict in, 165.
- what damages may be recovered, 164.
- form of judgment in, 165, 166.
- costs in the action, 167.
- form of the execution, 167.
- action of, abates on death of defendant, 167, 192.
- when and how plaintiff may discontinue, 168, 191.
- affidavit in, what to contain, 169-173.
- when affidavit may be amended, 191.
- security on part of plaintiff, 174-177.
 - form of undertaking, 174.
 - sheriff cannot dispense with, 175.
 - amendment of undertaking, 175.
 - liability of sureties, 176.
 - where non-resident is plaintiff, 176.
 - action on undertaking, 176.
 - qualification of sureties, 176.
 - undertaking, how disposed of, 177.
- requisition to take property, how executed, 177-180.
 - seizure of property by sheriff, 177.
 - can only be taken from defendant or servant, 177.
 - when protected by process, 177.
 - property, how taken when concealed in buildings, 177, 178.
 - when sheriff a trespasser, 178.
 - service of copies on defendant, 178.
 - sheriff's return, 179.
- property, how kept, 179.
 - what care sheriff should use, 179.

CLAIM AND DELIVERY (*Continued*).

- when the property to be delivered to plaintiff, 179.
- redelivery of property to defendant, when may be had, 184.
 - undertaking for, by defendant, 185.
 - qualification of sureties in, 185.
 - justification of sureties in, 185.
 - sheriff to retain property till justification, 186.
 - how disposed of, 186.
 - action on, 187.
 - when evidence of possession, 186.
 - property not to be delivered to plaintiff after, 186.
- where property is claimed by third person, 188, 189.
 - when may replevy, 188.
 - when must make the affidavit, 189.
 - undertaking by plaintiff, 190.
- sheriff to file papers, 190.
- sheriff to make return, 190.
- when motion may be made to set aside proceedings, 190.
- when plaintiff may amend original affidavit, 191.
- when action abates, 192.
- arrest of the defendant in, 36-39, 192. (*See Arrest*).
- when injunction granted in action of, 313.

CLAIM

- admitted due when ordered satisfied, 561.

CLERK OF COURT

- not competent as bail, 93.

COMPLAINT

- need not allege fraud to justify arrest under sub 4, § 179, 40.
- when may be used as affidavit on arrest, 59.
- in action against sheriff for escape, how drawn, 117.
- to be laid before judge on application for injunction, 318.
- when to contain prayer for injunction, 206, 207, 314.
- when may be used as affidavit for injunction, 317.
- dismissal of, discharges injunction, 339.
- when to contain prayer for receiver, 471.
- need not be filed before *ne exeat* issues, 570.

COMMISSIONS

- of receivers, what are, and how allowed, 496.
- of corporations, 556.

COMMISSION MERCHANTS

- when liable to arrest for proceeds of consignments, 28-31.

COMMISSIONERS OF HIGHWAY

injunction of, 310, 247.

CONCEALING

property, what is, 364.

arrest for, 36 - 39.

insolvency, when fraud, 41.

CONFUSION

attachment in case of, 404.

CONTRACT

arrest in actions not rising out of, 17.

in restraint of trade, when enforced by injunction, 252.

in articles of partnership, breach of, enjoined, 253.

for exclusive service, how enforced, 253.

for contribution, breach of, when enjoined, 254.

in open court will be enforced, 254.

illegal, not enforced, 254.

CONVERSION

of property, arrest for, 22, 23.

CORPORATIONS

arrest of officers of, 28.

may assign causes of action, 14.

when injunction may be had against, 283.

who bound by injunction against, 330.

injunctions against, how granted, 284, 322.

to restrain the illegal exercise of a right or franchise, 284.

on whose application granted, 285.

when stockholders may have, 286.

in actions against directors, corporation to be party, 286.

directors of, cannot discontinue business, 286.

will be dissolved after one year's suspension, 287.

having banking powers, when enjoined, 288.

proceedings against, by creditors when restrained, 288.

how creditors to make themselves parties to suit against, 289.

effect of wrongful acts of directors; neglect to hold election, 289.

moneyed, statutory definition, 290.

what acts directors of, may not do, 290.

transfers by, when void, 291.

for banking purposes under the act of 1838, 292.

when majority of, cannot control, 292.

restraining opening of transfer books, 293.

payment of dividends, when restrained, 293.

CORPORATIONS (*Continued*).

- application by attorney general for injunction against, 293.
- banking, injunction against, 294.
- when execution against, is returned unsatisfied, 294.
 - course of hearing before judge, 294.
 - injunction to be continued till claim is paid, 295.
- when declared insolvent and restrained, 295.
- when restrained at suit of stockholder, 295.
- suspension of specie payment no proof of insolvency, 296.
- municipal, injunction against, 296.
 - control and regulation of street, 297.
 - granting easements in street by, 298.
 - restraining appropriation of money by, 299.
 - restraining wrongful injury to others by, 299.
 - enjoining assessments made by, 300.
 - who may have injunction against, 300.
- religious, when restrained, 300.
- who bound by injunction against, 301.
- how injunction against, enforced, 306, 333.
- foreign, when attachment may be had against, 352, 353, 365.
 - how foreign character of, determined, 352.
- attaching defendant's interest in, 389.
- receivers of, under sub 4, § 244, 537.
 - must be clear case to authorize, 538.
 - when court may appoint, 538.
 - in actions to vacate charter, 538.
 - actions by attorney general in name of the people, 539.
 - judgment of forfeiture against, 539.
 - restraining corporation and appointing receiver, 540.
 - cases provided by special statutes, 540.
 - provisions not abolished by the Code, 540.
 - where execution against corporation returned unsatisfied, 540.
 - powers of receiver in such case, 541.
 - effect of the appointment of, 542.
 - further powers and duties, 542.
 - call meeting of creditors, etc., 543.
 - order of paying debts and making dividends, 544.
 - second dividend, and how made, 544.
 - surplus, how disposed of, 545.
 - receiver subject to supreme court, 546.
 - to render account to court, when and how, 546.
 - hearing thereon; account from time to time, 547.

CORPORATIONS (*Continued*).

- receivers dividends in case of banking corporations, 547.
- to make dividends as ordered by the court, 547.
- to pay over money to successor, 547.
- is a trustee for both parties; appointment not impeachable collaterally, 548.
- assets, how distributed among creditors, 548.
- when corporations may satisfy judgment and have receiver discharged, 549.
- proceedings against directors, etc., of a corporation, 549.
- jurisdiction, how exercised, 550.
- on whose application, 550.
- effect of suspending business, etc., for one year, 550.
- what acts amount to a suspension, 550.
- voluntary dissolution, 551.
- petition to be referred; appointing receiver, 551.
- who may be receivers, and their powers, 552.
- their general powers and duties, 552.
- proceedings against insolvent banking and insurance corporations, 552.
- appointing and duties of receiver thereupon, 553.
- when to file statements, to distribute moneys, etc., 553.
- of mutual insurance companies to make assessments on premium notes, 554.
- where officers have misapplied property, 555.
- in mutual insurance cases controversies may be referred, 555.
- receivers of savings banks how to distribute money, 555.
- compensation of receivers of corporations, 556.

COSTS

- in action of claim and delivery, 167.
- bail liable for, on appeal, 110.
- arrest on execution for, 137.
- and allowances in attachment suit, 460.
- when receiver may recover of *cestui que trust*, 493.

COURT

- officers of, cannot be bail, 92.

COUNTY JUDGE

(*See Judge*).

COVENANTS RELATING TO REAL PROPERTY

- when court of equity will enforce, 241.
- restricting use of leased premises, 242.

COVENANTS RELATING TO REAL PROPERTY (*Continued*).

- by purchaser when enforced, 242.
- by landlords, 243.
- restricting use when not enforced, 243.
- building covenants, 244.
- in contracts for the sale of land, 244.

CREDITORS' SUIT

- when injunction granted in, 280 - 282.
- receivers in, 532.
- when may be maintained, 532.
- to cancel prior judgment, 533.
- to set aside fraudulent conveyance, 532.
- attaching creditor may maintain before judgment, 533.
- when receiver appointed in, 534, 535.
- receiver in, trustee for all parties, 535.
- powers and duties of receiver in, 535.
- when property has been fraudulently conveyed, 535.

CRIM. CON.

- arrest in action for, 20.
- what facts to be set forth in action of, for arrest, 62.

CROPS

- when personalty, 158.

CUSTODY OF LAW

- persons in, not arrestable, 78.
- property in, not attachable, 394.
 - cannot be replevied, 154.

DAMAGES

- what may be recovered in claim and delivery, 164.
- sustained from injunction, how assessed, 341.
 - when reference to assess may be ordered, 341.
 - assessment of after discontinuance, etc., 342.
 - notice of motion for, 342.
 - what to be allowed, 342.
 - what special, 343.
 - defendant enjoined but not served may recover, 343, 344.
 - want of jurisdiction in judge will not deprive defendant of, 344.
 - report of referee appointed to assess, what to contain, 344.
 - to be confirmed, 344.
 - how recovered after assessment, 344.
- on undertaking for attachment, what may be recovered, 384.

DEATH

- of party does not render injunction inoperative, 339.
- of defendant abates action of claim and delivery, 167.
 - exonerates bail, 111.
 - when presumed on motion to exonerate bail, 112.

DEBTS

- * arrest for fraud in contracting, 40 – 56.
- and obligation, definition of, 41.
- discharge of defendant from, ground for exonerating bail, 113.
- on what, attachment may be had, 360.
- sale of attached, 440.
- bad, when receiver may sell, 496.

DEBTORS

- arrest of, for fraud in contracting debt, 40 – 46.
 - for fraudulent removal, etc., of property, 51 – 55.
- attachment against absconding or concealed, 361, 365.
 - for fraudulent removal of property, 365.

DECEIT

- arrest for, 46 – 48.

DEED

- transfer of, when enjoined, 268.
- when omission in, not ground for attachment, 369.

DEDICATION

- what is, and when protected by injunction, 222.
- effect of, 222.
- subjects of, 222.
- how accepted by the public, 223.
- what acts amount to, 223.
- when cannot be revoked, 224.

DELIVERY

- of property to plaintiff, when ordered, 557.

DEMAND

- attorney entitled to, before arrestable for moneys collected, 26.
- when to be made before action of claim and delivery, 151.

DEPOSIT INSTEAD OF BAIL

- when may be made, 102.
- duty of sheriff on receiving, 102, 103.
- when bail may be given after, 102.
- how disposed of, 102, 103, 104.
- at risk of depositor, 103.
- attaching in another suit, 104.

DEPOSIT INSTEAD OF BAIL (*Continued*).

- where defendant surrenders himself, to be returned, 104.
- application of, in satisfaction of judgment, 104.
- when to be returned to depositor, 104.

DEPOSIT

- of money, etc., in court, 557.
- in what cases ordered, 558.
- in actions against executors, etc., 558.
- of what property ordered, 558.
- motion for, when and how made, 559.
- order for, what to contain and how served, 559.
- how made, 559.
- disobedience to order for, how punished, 560.

DISCHARGE

- from arrest, 89, 102, 122.
- of bail, 111.
- of attachment, how obtained, 444-455.
- undertaking for, 445.

DISCRETION

- of judge in granting order of arrest, 11.
 - injunction, 204.
- appointing receiver, 467.

DISCONTINUANCE

- of action of claim and delivery, 191.
- discharges injunction, 339.

DISPOSAL OF PROPERTY

- fraudulent arrest for, 36-39, 51-55.
 - when assignment is, 52-54, 367.
 - through ignorance of law, 54.
 - injunction of, 313.
 - attachment for, 366-370.
 - proof of, 62, 365-370.

DISSOLVING INJUNCTION

- motion for, how made, 334, 335.
- on *ex parte* application, 334.
- on plaintiff's papers, 335.
- when motion may be renewed on merits, 335.
- on motion made on answer, 336.
- where answer denies all the equities, 336.
- where defendant opposed granting may move for, 337.
- all defendants must answer before, 337.
- affidavits for, how drawn, 337.

DISSOLVING INJUNCTION (*Continued*).

- when defendant in contempt may move for, 337.
- copies of answer and affidavits to be served, 338.
- affidavits on motion for, 338.
 - by plaintiff where motion for, is on answer, 338.
- copy of order for, to be served, 339.
- when judge to decide motion for, 340.

DISOBEDIENCE

- to injunction, how punished, 332.
 - by corporation, 301, 333.
 - of order to deposit money in court, how punished, 560.

DIVERTING WATER

- injunction against, 224-233.

DIVORCE

- arrest in action for, 21.
- when injunction granted in action for, 307.
- when receiver appointed in actions for, 510.
- ne exeat* in, action for, 510.

DOMICIL

- (*See Residence*).

DWELLING

- when officer may enter to make arrest, 80.
- who are protected by privilege of, 81.
- privilege limited to, 82.
- where the whole or part of, is rented, 82.
- where outer door is open officer may enter, 83.
- where defendant escapes officer may break in, to retake him, 82.
- when sheriff may break in, to execute attachment, 406.
- property, how taken when concealed in, 177, 178.

EASEMENTS

- when injunction will be granted to protect, 218.
- of light and air, 218.
- of party-wall, 219.
 - to what extent may be altered by one owner, 220.
- of support of soil from soil, 221.
 - effect of carelessness in digging, 222.
- of dedication, 222-224.
- of watercourses, 224-233.
- of eaves drip, 233.
- of highways and roads, 233.
- of pews in a church, 234.

EAVES DRIP

when injunction granted in relation to, 232.

EJECTMENT

when receiver appointed in action of, 507.

receiver cannot bring action of, without leave of court, 488.

action of, cannot be brought against receiver without leave, 488.

in whose name receiver to bring, 490.

EMBEZZLEMENT

liability of public officers, agents of corporations, etc., for, 16.

ENTITLING

affidavits for arrest, 58.

in claim and delivery, 170.

for attachment, 379.

ESCAPE

what is, 118-121.

action against sheriff for, 116, 117.

what sheriff may show in defense of, 117.

complaint in action for, what to state, 117.

from jail liberties, what is, 87.

EVIDENCE

unauthorized publication of, how restrained, 257.

EXCEPTION TO BAIL

(*See Justification of Bail*).

EXECUTION

arrest on, when may be had, 134-139.

when order of arrest was irregular, 126.

when complaint unnecessarily contains allegations of fraud, 134.

when it depends on prior order of arrest, 135.

where order of arrest has been vacated, 135.

after discharge from arrest on order, 135.

at what time may be had, 136.

effect of, before return of execution against property, 136.

when had without order of court, 136.

for costs, 137.

the effect of, 137.

when defendant may move to set aside, 137.

defendant entitled to jail liberties, 138.

when supersedeas may be had, 138.

time for charging in, how computed, 139.

when creditor may discharge defendant from, 139.

EXECUTION (*Continued*).

- what property exempt from, 390–392.
 - how exemption from, waived, 392.
- property exempt from, not liable to be attached, 389, 390.
- form of, on judgment in an action of claim and delivery, 167.
- when property taken on, may be replevied, 153, 154.
- when may be restrained by injunction, 278.
- when money collected on may be attached, 394.
- where defendant in attachment suit dies, who may order, 439.
 - how indorsed, 439.
- in attachment suit where sheriff's term of office has expired, 439.
- against corporations, proceedings when returned unsatisfied, 540.
- who may issue, after appointment of receiver, 536.
- when receiver may be appointed before return of, 518.
- receiver when appointed in proceedings supplementary to, 515.

EXECUTORS

- when may maintain action of claim and delivery, 145.
- when may be enjoined, 306.
- when cannot be attached, 372.
- when may be superseded by receiver, 504.
- when ordered to deposit funds in court, 558.
- of bail may surrender principal, 106.

EXEMPTION

- from arrest. (*See Privilege from Arrest*).

EXONERATION OF BAIL

- in what manner, 111.
 - by death of principal, 111, 112.
 - when death presumed, 112.
 - by imprisonment of principal, 112.
 - by judgment for defendant, 112, 113.
 - by discharge of principal from his debts, 113.
 - by abolishing law on which principal was arrested, 113.
 - by surrender of principal, 105, 113–114.
- what papers to be presented on motion for, 115.
- order of, and papers to be filed, 115.
- motion for, before whom made, 115.
- papers, on motion for, to be served on plaintiff, 115.
- must be had, before motion for supersedeas, 139.

EXONERETUR

- bail failing to justify, entitled to, 99.
- to bail on surrender of defendant, 105.
- bail entitled to, by death, imprisonment or discharge of principal, 112.

EXONERETUR (*Continued*).

- on motion for, discharge from debts cannot be questioned, 113.
- not granted on the ground that claim in the suit has been settled, 113.

FACTOR

- liability to arrest for money received in fiduciary capacity, 25, 28.
- when acts in fiduciary capacity, 28, 34.

FALSE IMPRISONMENT

- arrest in action for, 21.
- when defendant not liable for, 61.
- condition not to bring action for, in order for vacating arrest, 130.
- party issuing void execution against person, liable for, 136.

FEMALES

- only liable to arrest for injury to person, character, or property, 55.
- for what causes cannot be arrested, 24, 25, 35, 39, 50, 55, 56, 78.
- when may be arrested on execution, 56.
- married, not liable to arrest in any civil action, 56.

FEEES

- of sheriff on attachment, 456 - 460.
- of appraisers, on inventory of attached property, 457.
- sheriff may assign claim for, 459.
- of receiver, 496.
 - of corporations, 556.

FIDUCIARY

- meaning of term, 28 - 34.

FILING

- affidavit for arrest when, 62.
- undertaking of plaintiff to procure arrest, 64.
- order of exoneration, 115.
- undertaking of bail, 100.
- papers in claim and delivery, 190.
- affidavits on which injunction issues, 319.
- undertaking for injunction, 327.
- affidavit on attachment, 379.
- undertaking for attachment, 383.
- bond of receiver, 477.
- inventory of receiver, 494.
- bond of receiver in supplementary proceedings, 522.
- of receiver's bond, title relates back, 481.

FINAL ACCOUNTING

- of receiver, 496.

FIXTURES

- what are, and what are not, 157 - 163.
- not attached to freehold not waste to remove, 216.
- severed from freehold may be replevied, 157, 162.
- when tenant may remove, 160.

FORECLOSURE

- of mortgage, when restrained by injunction, 273.
- restraining waste pending action for, 207, 312.
- when receiver appointed in action of, 506, 507.

FOREIGN CORPORATIONS

- how foreign character of, determined, 352.
- when property of, may be attached, 352 - 354.
- may have attachment, 352.
- receiver of, may be appointed, 465.

FORMS

- for arrest and bail, 577.
- for affidavit of injury to person, 577.
 - of non-residence, 577.
 - of intended departure, 578.
 - money received in fiduciary capacity, 578.
 - money collected by agent, 578.
 - injury to property, 579.
 - to recover possession of property, 579.
 - fraud in contracting debt, 580.
 - fraudulent disposal of property, 581.
- undertaking by plaintiff, 582.
 - affidavit of justification, 583.
 - acknowledgment, 583.
 - indorsement of judge's approval, 584.
- order of arrest, 584.
 - under sub 3, § 179, 584.
- undertaking of bail, 585.
 - in action for chattel, 585.
- notice of exception to bail, 586.
 - bail justifying, 586.
 - of other bail, 586.
- affidavit for further time to justify, 587.
- order extending time to justify, 588.
- examination of bail, 588.
- allowance of bail, 588.
 - with order to refund money, 589.
- certificate of deposit in lieu of bail, 589.
 - by clerk, 589.

FORMS (*Continued*).

- notice of motion to vacate order of arrest, 590.
 - order vacating, 590.
 - on condition, 591.
- authority from bail to arrest defendant, 591.
- certificate of surrender, 591.
- notice of motion to exonerate, 592.
- order exonerating bail, 592.
- notice of motion to enlarge time to surrender, 593.
 - affidavit for, 593.
- bond for jail liberties, 594.
- requirement of bail to jail keeper, 594.
- certificate of surrender, 595.
- for claim and delivery, 596.
 - affidavit to obtain delivery, 596.
 - denying knowledge of cause of detention, 596.
 - of property exempt from execution, 597.
 - requisition to indorse on affidavit, 597.
 - undertaking by plaintiff, 598.
 - approval of sheriff, 598.
 - of defendant for return of property, 599.
 - notice to sheriff to return property, 599.
 - affidavit of claim by third person, 600.
 - sheriff's notice of third persons' claim, 600.
 - undertaking to indemnify sheriff, 601.
 - notice of motion to set aside proceedings, 601.
- for injunctions, 603.
 - affidavit in support of complaint, 603.
 - notice of motion for injunctions, 604.
 - order to show cause with injunction, 604.
 - undertaking for injunction, 605.
 - bond to stay proceedings in actions, 605.
 - injunction by judge, 606.
 - court, 606.
 - continuing after order to show cause, 607.
 - against waste, 608.
 - by cutting timber, 608.
 - by working mines, 608.
 - removing lateral support, 609.
 - taking lands without payment, 609.
 - removing fixtures, 609.
 - obstructing ways, 609.
 - erecting buildings, 610.
 - violating building covenant, 610.

FORMS (*Continued*).

- for injunctions against nuisance, slaughter houses, 610.
 - laying rail road in city, 611.
 - authorizing rail road in city street, 611.
 - carrying on business forbidden by lease, 611.
 - transfer of negotiable paper, 612.
 - publishing private letter, 612.
 - disclosing secret by clerk, 612.
 - use of secret in trade, 613.
 - infringing trade mark, 613.
 - in partnership cases, 613, 614.
 - proceedings at law, 614.
 - dispossessing tenant, 614.
 - in creditor's action, 615.
 - disposing of property with intent to defraud creditors, 615.
- notice of motion to dissolve, 615.
- order dissolving, 616.
- notice of motion to ascertain damages, 616.
- order of reference to assess, 617.
 - confirming report, 617.
- for attachments, 619.
 - affidavits, 619.
 - foreign corporation, 619.
 - absconding debtor, 620, 621.
 - removal of property, 621.
 - undertaking for, 622.
 - warrant of attachment, 622.
 - sheriff's return to, 623.
 - inventory, 623.
 - order for sale of perishable property, 624.
 - notice of levy on property incapable of manual delivery, 624.
 - certificate to be indorsed on copy, 625.
 - order to examine third person holding property, 625.
 - bond on claiming vessel, 626.
 - order discharging vessel, 626.
 - undertaking to enable plaintiff to bring action, 627.
 - notice of motion to discharge attachment, 627.
 - on security, 628.
 - undertaking to discharge, 628.
 - order vacating on motion, 629.
 - discharging security, 629.

FORMS (*Continued*).

- for attachments, execution where sheriff's term has expired, 630.
- for receiver, 631.
 - notice of motion for, 631.
 - order to show cause on, 631.
 - of appointment by court, 632.
 - in partnership cases, 632.
 - in supplementary proceedings, 634.
 - of reference to appoint, 635, 636.
 - summons to attend reference, 636.
 - proposal for, 637.
 - report of appointment, 637.
 - select, 638.
 - report, 639.
 - order confirming, 639.
 - bond of, 639.
 - petition for leave to sue, 640.
 - order to sue, 641.
 - to sell bad debts, 641.
 - order to sell, 642.
 - to pass counts and be discharged, 642.
 - order of reference thereon, 643.
 - referee's report thereon, 645.
- for other provisional remedies, 646.
 - order to deliver property into court, 646.
 - satisfy admitted claim, 646.
- for *ne exeat*, 648.
 - affidavit for, 648.
 - writ of, 648.
 - indorsement on, 649.
 - order of, 650.
 - bond to sheriff, 650.

FRAUD

- of officers, attorneys, agents, etc., arrest for, 25.
- in contracting debt, arrest for, 40-56.
- when not to be alleged in complaint, 40.
- to purchase goods with intent not to pay, 42.
- proof of intent necessary to justify arrest for, 42, 43, 51.
- how proved, 43.
- must be personal to justify arrest, 45.
- of agent, when principal arrestable for, 45.
- or deceit, arrest for, 46-48.

FRAUD (*Continued*).

- in sale of land, 47.
- in representing responsibility of third person, 47.
- in foreign country arrest for, 24, 45, 55.
- female not liable to arrest for, 50.
- in removal of property, arrest for, 51.
- in disposing of property, 313.
- in removing or disposing of property, 365.
- of one partner when copartners arrestable for, 45, 46.

FRAUDULENT

- representations in purchase of goods, arrest for, 40.
 - of responsibility of third persons, 47.
 - in sale of land, 47.
 - form of affidavit for arrest for, 60.
- disposal of property authorizing arrest, 51, 55.
 - injunction, 313, 314.
 - attachment, 365.
- assignment, receiver may maintain action to set aside, 492.
 - may be impeached by attaching creditor, 435.
 - by sheriff, 398, 436.

FREEHOLDER

- who is, 91.

GOODS

- action to recover possession of, 141.
- fraud in purchasing, arrest for, 40, 56.

GUARDIAN

- liable to injunction against waste, 214.

HEIR

- when not subject to attachment, 372.

HIGHWAYS

- when injunction granted in relation to, 234, 249.
- dedication of, what amounts to, 223, 224.
- commissioners of, when enjoined, 247, 310.

HOUSEHOLDERS

- who are, 91, 390.
- what property of, exempt from execution, 390.

HUSBAND AND WIFE

- wife not liable to arrest in civil actions, 56.
- husband not liable to arrest for tort of wife, 11, 56.
- when husband arrestable in actions for separations, 21.
 - may be enjoined in actions for divorce, 207, 307.

HUSBAND AND WIFE (*Continued*).

- when husband will be enjoined from controlling children, 308.
- when *ne exeat* granted in actions for divorce between, 568.

INDORSEMENT

- on order of arrest for penalty or forfeiture, 68.
- of notes, etc., when enjoined, 265-268.

INFANTS

- when receiver of estate of, appointed, 469, 510.
- en ventre sa mere*, when injunction granted in behalf of to restrain waste, 214.
- guardians of, liable for waste, 214.

INJUNCTION

- definition and nature of, 196.
- in what cases applied, 197.
- are either provisional or perpetual, 197.
- when a preventive remedy, 198.
- never retroactive, 202.
- writ of, abolished, 198.
- application for, when *ex parte*, 199.
- when notice of motion for, to be given, 199, 322.
- order of, by whom granted, 199, 344.
- judge related to either party cannot grant, 344.
- how granted against corporations, 200, 322.
- how and by whom granted against state officers, 200, 322.
- granted against parties and their agents, 200.
- when granted against persons not parties, 200.
- usually granted to plaintiff only, 202.
- when granted to defendant, 202.
- in what cases granted under Code, 203.
- power of the court to grant not abridged by the Code, 204.
- discretion of the court in granting, 204.
- to be granted with great care, 205.
- what must be shown to authorize, 205, 206.
- when must be prayed for in complaint, 206, 207.
- injury must be inevitable and continuing to justify, 207.
- not granted where plaintiff has remedy at law, 207.
- plaintiff must be free from fault, 208.
- when judge to decide motion for, 209.
- when granted to restrain trespass, 208, 210.
- to restrain cutting of line trees, 212.
- when granted to restrain waste, 206, 207, 210.
- who may have to stay waste, 213.
- against whom may be granted to stay waste, 214. (*See Waste*).

INJUNCTION (*Continued*).

- when granted in relation to easements and servitudes, 218-234.
- not granted to protect enjoyment of light and air, 218.
- when granted to protect party-walls, 206, 219, 220. (*See Party-walls*).
- to protect support of soil from soil, 221.
- when granted in relation to dedication, 222. (*See Dedication*).
- to restrain obstruction or diversion of water courses, 224-233.
- in relation to surface water, 225, 226, 232.
- to regulate the rights of mill owners, 226-230.
- when granted in relation to subterranean waters, 231, 232.
 - eaves drip, 232.
- to protect littoral rights in streams, 233. (*See Water Courses*).
- to restrain the appropriation of lands for a highway, 234.
 - laying out of road through a farm, 234.
 - obstructions of a public street, 234, 238.
- not granted to restrain trustees from removing pews, 234.
- to restrain nuisances, 235. (*See Nuisances*).
- to enforce covenants relating to real property, 241.
 - in leases, 241.
 - building covenants, 244.
 - covenants in sale of land, 244.
- of roads, rail roads and bridges, 245.
- of taxes and assessments, 250.
- of breach of contract, 252.
 - in restraint of trade, 252.
 - in articles of partnership, 253.
 - for exclusive service, 253.
 - of illegal contracts, 254.
- to restrain infringement of copyrights, 255.
 - publication of manuscript, 255, 257.
 - private letters, 256.
 - lectures, 257.
 - evidence, 257.
- infringement of patents, 255.
 - trade marks, 258-264.
 - signs, 263.
- of transfer of notes, deeds and stocks, 265.
- of sailing of ships, 268.
- of actions and judgments, 269.
 - in another court, 272.
 - to foreclose mortgage, 273.
 - by or against receivers, 274.
 - in another state, 274-276.
 - in United States court, 276.

INJUNCTION (*Continued*).

- of summary proceedings, 277.
- of judgment, 277 - 279.
- effect of, as to limitation of actions, 279.
- in creditors' suits, 280.
- of corporations, 283.
- who bound by, 330.
- of partners, 302.
- against agents, 306.
 - executors, assignees and trustees, 306.
 - receivers, 307.
 - attorneys, 307.
 - husbands in divorce suits, 307.
 - public officers in actions to test title, 308.
 - officers having discretionary powers, 309.
 - public officers, 310.
 - state officers, 310.
- of acts pending litigation, 312.
- of waste pending foreclosure suit, 312.
- in action of claim and delivery, 313.
- to restrain disposition or removal of property, 313 - 315.
- at what time granted, 316.
- affidavit for, what to contain, 316.
 - when complaint used as, 316.
 - to be served, 319.
 - to be filed, 319.
- order to show cause before granting, 321.
 - restraint in meantime, 321.
- after answer, 322.
 - restraint in meantime, 322.
- to suspend business of corporation, 322.
- security on granting, 324.
 - undertaking, form and execution of, 324.
- form of order of, 328.
- service of, 329.
- obedience due, 330 - 332.
- disobedience of, how punished, 332.
 - by corporations, 333.
- dissolving and modifying, 334.
 - on *ex parte* motion, 334.
 - on plaintiff's papers, 335.
 - on answer, 336.
 - affidavits on motion for, 338.
 - when motion for, to be decided, 340.

INJUNCTION (*Continued*).

- dissolving, appeal from order, 339.
- does not become inoperative by death of party, 339.
- abandoning, discontinuing, etc., 339.
- how affected by dismissal of complaint, 339.
- assessment of damages from, 341.
 - what damages allowed, 342.
- in proceedings supplementary to execution, 528-530.
- when receiver to be appointed with, 534.

INJURY

- to person or character, arrest for, 20, 21.
 - crim. con.*, 29.
 - seduction, 20.
 - in actions for separations, 21.
- to property, 22.
- to real property, 22.

INNKEEPER

- not arrestable for loss of baggage, 23.

INSTRUCTIONS

- to receiver, who to apply for, 484.

INSOLVENCY

- when purchaser bound to disclose, 41.
- concealing with fraudulent intent, 42.

INTENT

- proof of, required to justify arrest, 11, 51.
- when may be charged in the alternative, 38, 377.
- not to pay for goods purchased, 42.
- to defraud, how proved, 42, 366, 369.
- removal of property with fraudulent, 51, 313, 365.
- question of, one of fact, 366.

INVENTORY

- of attached property, 413.
 - fees of appraisers on, 457.
- receiver to file, 494.

JAIL LIBERTIES

- who entitled to, 85, 86, 138.
- bond for, 86.
- escape from, 87.
- boundaries of, to be exhibited, 87.

JUDGE

- approval of, to be indorsed on undertakings, 64, 327, 382.
- discretion of, in granting order of arrest, 11.

JUDGE (*Continued*).

- discretion of, in granting order of injunction, 204.
 - in appointing receiver, 467.
- county when may grant order of arrest, 67.
 - vacate order of arrest, 124.
 - grant injunction, 199.
 - dissolve or modify injunction, 334.
 - grant attachment, 385.
 - discharge attachment, 448.
- related to either party cannot grant provisional remedy, 67, 344, 386.
- not competent as bail, 92.

JUDGMENT

- how satisfied from deposit for bail, 104.
- for defendant exonerates bail, 112.
- proceeding on, against sheriff for escape, 116.
- in actions on, defendant not arrestable, 34, 49.
- form of, in claim and delivery, 166.
- when restrained by injunction, 277, 278.
- security on restraining, 270, 279.
- enjoining justices, 274, 278.
- in attachment suit how satisfied, 437.
 - where defendant recovers, 442.
- when receiver appointed after, 511.

JURY

- to try claim to attached property, 427.
 - effect of verdict, 427, 428.
 - what to be, 427.

JURISDICTION

- want of it in judge will not deprive defendant of damages from injunction, 344.
- judge related to either party has not, 67, 344, 386.

JUSTICE OF PEACE

- judgment of, enjoined, 274, 278.
- justification of bail cannot be before, 97.

JUSTIFICATION

- of bail, 95.
 - exception to, 95.
 - notice of, 96.
 - time when to be made, 96.
 - before whom, 97.
 - how conducted, 97, 99.

JUSTIFICATION

- of bail, when further time for, granted, 98.
 - where made, 99.
 - failure of, 98, 99.
 - qualifications of bail on, 91 – 93, 100.
 - allowance of, 101.
 - conclusive, 101.
- of sureties in claim and delivery, 182.
- sheriff liable till, 182.
- in undertaking for redelivery, 185.

KEEPER OF JAIL

- to exhibit description of jail liberties, 87.
- duties of, on surrender by sureties for liberties, 86.

LAND

- arrest for injury to, 22.
- fraud or deceit in sale of, arrest for, 47.
- injunction of trespass on, 210.
- waste to, what is and injunction for, 210, 217.
- lateral support of, 221.
- dedication of, 222.
- easement of water from upper to lower, 232.
- enjoining appropriation of, for highway or rail road, 233, 247.
- covenants in lease of, enforced, 241.
 - restricting use, 241 – 243.
- contracts for sale of, injunctions as to, 244.
- assessments and taxes on, when enjoined, 250.
- summary proceedings for recovery of, injunction of, 277.
- injunction of injury to, pending suit, 312.
- for burying ground exempt from execution, 322.
- how attached, 412.
- receivers in actions to recover, 507.

LANDLORD AND TENANT

- summary proceedings, between injunction of, 277.
- landlord may enjoin waste of tenant, 213.
 - obstruct windows of tenement, 219.
- covenants between, as to use of premises, enforced, 241.
- law of fixtures as between, 157 – 162.

LATERAL SUPPORT

- of soil from soil, injunction as to, 221.

LAW

- persons in custody of, not arrestable, 78.
- property in custody of, not attachable, 394.
 - cannot be replevied, 154.

LEASE

covenants in, enforced by injunction, 241.
receiver may make for year, 488.

LECTURES

injunction of unauthorized publication of, 257.

LEGAL PROCEEDINGS

injunction of, 269.

LETTERS

enjoining publication of, 257.

LIBERTIES OF JAIL

who entitled to, 85, 138.

LIEN

one having, may maintain replevin, 150.
of vendor, till payment, 150.
when defense to replevin, 154.
property subject to, how attached, 393, 419.
of judgment in attachment suit, 433.
as to priority of, on attachments, 433.
appointment of receiver does not effect, 481, 528.
duty of receiver in relation to property subject to, 488.

LIGHT AND AIR

obstruction of, not enjoined, 218.

LIMITATION

of action, effect on, of injunction, 279.
receiver, 466.

LINE TREES

cutting of, enjoined, 212.

LIS PENDENS

to be filed on attaching real property, 412.

LITIGATION

restraining acts pending, 312.
disposal of property, 313.

LITTORAL

rights on streams, 233.

LUNATICS

receiver of estate of, 509.

MACHINERY

when personalty, 159.

MALICIOUS PROSECUTION

arrest for, 61.

MANURE

when part of realty, 159.

MANUSCRIPTS

property in, protected by injunction, 255 - 257.

MARRIAGE

breach of promise of, females not arrestable for, 25.

MARRIED WOMEN

not liable to arrest, 56.

how title to property alleged, 62.

in action for divorce, may have injunction, 307.

residence of, 356, 361.

MEMBERS

of congress exempt from arrest, 72.

of legislature exempt from arrest, 72.

of capital or metropolitan police exempt from arrest, 74.

MILITIA

persons belonging to, exempt from arrest, when, 74.

MILLS

owners of, to what extent may use water, 227.

how far may set back water, 228.

cannot divert water, 230.

rules governing, in use of water, 226, 231.

machinery in, when personalty, 159.

MINES

waste in, enjoined, 206, 216.

when tenant for life may work, 216.

MINORS

residence of, 356.

receivers of estates of, 510.

guardians of, liable for waste, 214.

MONEY

when received in fiduciary capacity, 28.

deposited as bail, 102.

enjoining appropriation of, by municipal corporation, 298.

MONEYED CORPORATIONS

injunction of, 290.

receivers of, 537.

MORTGAGES

restraining foreclosure of, 273.

waste pending foreclosure, 207, 312.

fraudulent representation as to contents of, ground for relief, 47.

MORTGAGES (*Continued*).

- receiver on foreclosure of, 506, 507.
- attachment of goods covered by, 395.

MORTGAGOR

- of goods, when may replevy, 150.
- may be enjoined against waste, 214, 312.
- interest of, in goods attachable, 395.

MORTGAGEE

- of goods, when may maintain replevin, 149.
- may have injunction against waste, 214, 312.
- cannot have receiver on ground of waste, 508.
- restrained from foreclosure, 273.
- receiver over, when appointed, 507.
- cannot be receiver, 468.

MOTION

- for order of arrest, 66.
- for further time to surrender, 107.
- to vacate order of arrest, 122.
- to discharge proceedings of claim and delivery, 191.
- for injunction, 316.
- to dissolve injunction, 334.
- for attachment, 385.
- for order to sell perishable property, 416.
- to discharge attachment, 444.
- for receiver, 460.
- for order to bring property into court, 559.
- for *ne exeat*, 568.
- for satisfaction of admitted claim, 564.

MUNICIPAL CORPORATIONS

- injunction of, 296.
- powers of, in regulating streets, 297.

NAMES

- unknown, how designated in affidavit for arrest, 59.
- order, 67.
- similarity of, in trade marks, 262.
- common, not protected as trade mark, 261.
- of hotels, etc., protected, 264.
- of magazines and newspapers protected, 263.

NAVIGABLE STREAMS

- littoral rights in, 233.
- injunction of nuisance and purpresture thereon, 233.

NE EXEAT

when and how granted, 567.

NEGOTIABLE INSTRUMENTS

enjoining transfer or collection of, 208, 265.

NEGATIVE CONTRACTS

enforced by injunction, 252.

NON-RESIDENTS

who are, 18, 19, 354-361.

may have attachments, 352.

attachments against, 354.

may assign cause of action to resident, 354.

how described in affidavit for arrest, 62.

NON-RESIDENCE

(*See Residence*).

NOTES

enjoining transfer of, 265.

collection of, 208, 266.

for money received in fiduciary capacity, 34.

for debt fraudulently contracted, 48.

attached, sheriff to collect, 417.

how attached, 417, 419.

arrest for conversion of, 23.

NOTICE

of non-acceptance of bail, 95.

of justification of bail, 96.

of motion to vacate order of arrest, 126.

for exoneration of bail, 115.

of exception to sureties in replevin, 181.

of justification of sureties in replevin, 182.

of motion for injunction, 199, 322.

to dissolve injunction, 334.

for reference to assess damages, 342.

for sale of perishable property, 432.

to discharge attachment, 449.

for receiver, 470.

for instructions to receiver, 485.

for *ne exeat*, 572.

of property attached, 420.

NUISANCE

definition of, and remedy for, 235.

to dwelling house, 235.

to enjoyments of life and property, 236.

NUISANCE (*Continued*).

- to business, 237.
- when obstruction of street is, 238.
- how far things maintained by legislative authority, may be, 239.
- in obstructing navigable river, enjoined, 233.
- manufactories when, 237.
- public how restrained, 239.
- continuance of, 239.
- not legalized by prescription, 240.

OBSTRUCTIONS

- of water courses, and remedy for, 224 – 233.
 - by prescription, 228.
- of public harbor, when nuisance, 239.
- of navigable river, 233.
- of highways, 238.

OFFICERS

- of foreign government, arrest of, 26.
- public, arrest of, 25.
- of corporations and banking associations, 25, 28.
- of court, cannot be bail, 92.
 - when exempt from arrest, 75, 76.
 - receivers are, 466.
- of canal department, when exempt from arrest, 75.
- police, when exempt from arrest, 75.
- holding attached property may be examined, 423.
- of corporation, to obey injunction, 301.
- public, injunction against, 308.
- when restrained in action to test title, 308.
- having discretionary power, not enjoined, 309.
- state, how enjoined.
- of corporations, when may be receiver, 468, 552.

ORDER

- of arrest, by whom made and its form, 66 – 69.
 - must relate to whole cause of action, 11.
 - granted without security, void, 63.
 - when made by county judge, 67.
 - what local officer may grant, 67.
 - judge related to either party cannot grant, 67.
 - name of defendant how inserted in, 67.
 - summons need not be served before granting, 67.
 - what judgment will bar, 68.
 - indorsements on, in actions for penalty, 68.
 - when returnable, 69.

ORDER (*Continued*).

- of arrest, when return day may be changed, 69.
 - duty of sheriff on receiving, 71.
 - by whom executed, 72.
 - how executed, 70.
 - return of, 95.
 - how vacated, 122.
- exonerating bail to be filed, 115.
- arrest on execution without, 136.
- injunction by, substituted for writ, 196.
 - by whom granted, 199.
 - when granted, 316.
 - to show cause, 321.
 - when granted after answer, 322.
 - to suspend business of corporation, 322.
 - form and service of, 328.
 - to be obeyed, though erroneous, 330, 331.
 - who bound by, 331.
 - violation of, how punished, 332.
 - by corporation, how punished, 333.
 - how dissolved or modified, 334.
- for sale of perishable property attached, 426, 432.
- discharging vessel from attachment, 429, 430.
- discharging attachment, 444.
- of reference to select or appoint receiver, 473.
- receiver not to pay out money without, 489.
- appointing receiver in supplementary proceedings, 515, 520.
 - certified copy of, to be filed, 516, 521.
 - served on receiver, 516.
 - how drawn, 520.
- restraining transfer of property in sup. pro, 527, 528.
- for deposit of money, etc., in court, 557, 559.
- for satisfaction of admitted part of claim, 561, 564.
 - how enforced, 564.
 - how appealed from, 565.
- when *ne exeat* in form of, 572.
- staying proceedings, effect of, 15.

PARTNERS

- arrest of, for fraud of one, 11, 27, 45, 46.
 - copartner for removal of property, 54.
- replevin between, does not lie, 146.
- injunction of, 302.
 - for breach of covenant in articles of partnership, 252, 304.

PARTNERS (*Continued*).

- injunction of, on application of one, 303, 305.
 - only in case for dissolution, 303.
 - for temporary breach or difference of temper, 303.
 - for misconduct, 302, 304.
 - from destroying property, 303.
 - sudden dissolution, 303.
 - excluding copartner, 304.
 - carrying on separate business, 304.
 - misapplying property, 304.
 - applying firm moneys to private use, 304.
 - indorsing bills in firm name, 305.
 - receiving firm debts, 305.
 - removing firm books, 305.
 - publishing letter of copartner, 305.
 - using firm name after dissolution, 306.
 - of surviving, 305.
- absconding of one, not ground for attaching all, 363, 371.
- non-residence of one, not ground for attaching all, 371.
- on attachment against one, seizure of firm property, 371, 396.
 - interest of special partner, not liable, 372.
 - credits and choses in actions not liable, 397.
 - how sheriff to proceed, 411.
- sheriff may seize books and papers of, 397.
- receiver of property of, 500.
 - in action to close up, 500.
 - for what causes, 500–504.
 - not for quarrels, 500.
 - for breach of duty, 501.
 - for neglect of business, 501.
 - for death of copartner, 503.
 - for excluding copartner, 501.
 - for individual insolvency, 503.
 - for refusing access to books, 501.
 - one having property, cannot have, 501.
 - appointed to wind up business, 501.
 - when may continue business, 502.
- surviving, right to close up affairs, 503.

PARTNERSHIP

- property seized by attachment against one partner, cannot be replevied, 155.
- enjoining breach of covenant in articles of, 252, 304.
 - collection of note of, given for individual debt, 266.

PARTNERS (*Continued*).

- enjoining one partner from interfering with property of, 303.
 - sudden dissolution of, 303.
 - on application of another firm, 304.
 - use of property of, for private purposes, 304.
 - levy on property of, for individual debts, 305.
 - removal of books of, 305.
 - use of firm name after dissolution, 305.
- attaching property of, for individual debt, 371, 396.
 - credits and choses not liable, 397.
 - how sheriff to proceed, 411.
 - sheriff may seize books and papers of, 397.
- receivers of, 500.
 - to wind up, 500.
 - for what causes, 500 – 504.
 - when to continue business, 502.
 - duties, 502.
 - on death of one partner, 503.
 - limited, 503.
 - of insolvent limited, 469.

PARTIES

- to suits, privileged from arrest, 76.

PARTITION

- receiver in action for, 508.

PARTY-WALLS

- what are, 219.
- how repaired, 219.
- altering by one, 220.
- burnt, how rebuilt, 220.
- protected by injunction, 206, 219.

PATENTS

- state courts have no jurisdiction over, 255.

PENALTY

- indorsement on order of arrest for, 68.
- for withholding attached property, 441.

PERCOLATING WATERS

- not protected by injunction, 231.

PERISHABLE PROPERTY

- to be enumerated in inventory, 413.
- how sold, 416, 426.

PERSON

- injuries to, 20.
- execution against, 134.

PERSONAL PROPERTY

- arrest in action to recover, 36.
- replevin of, 142.
- what is, 157-162.
 - growing crops, 158.
 - trees when, 158, 161.
 - machinery, 159.
 - gas fixtures, 159.
 - stoves, 159.
 - manure, 159.
 - rails, 159.
 - buildings erected by tenant, 160, 161.
- confusion of, 163.
- attachment of, 399.
- what exempt from execution, 390-392.
- when title to, vests in receiver, 480.

PEWS

- right of trustees to change, 234, 301.

POLICE OFFICERS

- exempt from arrest, 75.
- not enjoined, 310.

PRESCRIPTION

- right to flow land by, 228.
 - divert water by, 229.
- does not legalize nuisance, 240.

PRINCIPAL

- when arrestable for fraud of agent, 45.

PRIORITY

- of attachments, 433.
- of liens, not affected by receiver, 481.

PREVENTIVE

- when injunctions are, 198.

PRIVILEGE FROM ARREST

- of members of congress, 72.
 - legislature, 72.
- of officers of legislature, 73.
- of ambassadors and foreign ministers, 73.
 - servants, 74.

PRIVILEGE FROM ARREST (*Continued*).

- of persons in army, navy, or militia, 74.
- of canal officers, 75.
- of policemen, 75.
- of attorneys, 75.
- of officers of court, 75.
- of jurors, 76.
- of sheriffs, 76.
- of parties to suit, 76.
- of witnesses, 76.
- of voters, 78.
- of females, 78.
- of persons in custody of law, 78.
- how sheriff to proceed where witness claims, 77.
 - any person claims, 80.
- one discharged on ground of, may be rearrested, 79.
- bail cannot set up, as defense to action, 109.
- persons claiming, should move to set aside arrest, 126.

PROFESSIONAL MISCONDUCT

- arrest for, 35.

PROPERTY

- arrest in action to recover, 36.
 - for disposing of, with fraudulent intent, 51.
- assignment of, when fraudulent, 62, 367.
- claim and delivery of personal, 141.
- personal, what is, 157-163.
- confusion of, 163.
- how preserved by sheriff, 177, 414, 415.
- how taken when concealed in buildings, 177, 178.
- attached for fraudulent removal, 365.
- disposal of, enjoined pending suit, 313.
- subject to attachment, 389.
- covered by lien, how attached, 393.
- in custody of law, not attachable, 394.
- what exempt from attachment, 390-392.
- heavy, how attached, 411.
- real, how attached, 412.
- incapable of manual delivery, how attached, 419.
- perishable, how inventoried and sold, 413, 416, 426.
- deposit of, in court, 557.
- receiver of, 464.
- what vests in receiver, 483, 523.
- when vests in receiver, 480.

PROPERTY (*Continued*).

liens are not affected by receiver, 481.
of partnership. (*See Partnership*).

PUBLIC OFFICERS

(*See Officers*).

PUBLICATION

attachments in actions commenced by, 373.
of private letters enjoined, 256, 305.
of manuscripts enjoined, 255, 257.

PURCHASER

not bound to reveal insolvency, 41.
arrest of, for intent not to pay, 42, 44.
for fraud in foreign country, 45.
when may show similar frauds of, 43.
fraudulent, replevin against, 148.
in good faith, replevin against, 151.

PURPRESTURE

injunction of, 239.
in navigable river, 233.

QUALIFICATIONS

of bail, 89, 91-94, 100.
of sureties for arrest, 63.
in claim and delivery, 176.
to obtain redelivery, 185.
on injunction, 325.
on attachment, 382.
for discharge of attachment, 445, 552.

QUO WARRANTO

to test title to office, 309.
proper remedy to restrain officer from acting, 300.

RAIL ROADS

injunction of, 245.
in a street, 245, 246, 297.
authorized by law, 246, 248.
at suit of property owner, 246.
from using highway without compensation, 247.
from permitting persons to cross toll bridge free, 247.
from neglecting to stop at stations, 248.
from removing rails, 247.
powers of the corporation of New York as to, 246, 297.
restraining encroachments on, 247.

RAIN WATER

- falling from eaves, 232.
- right of, to flow to lower lands, 232.

REAL ESTATE

- what fixtures are, 157-163.
- arrest for fraud in sale of, 47.
- injuring, 22.
- injunction of trespass on, 210.
- waste, 210-217.
- lateral support of, 221.
- dedication of, 222.
- water on, 224-234.
- covenants relating to, enforced, 241.
- for restricted use, 242.
- to build on, in certain manner, 244.
- for purchase and sale of, 244.
- for quiet enjoyment, 244.
- when transfer of deed of, enjoined, 268.
- how attached, 412.
- when title to, vests in receiver, 480.
- in sup. pro, 522.
- when receiver appointed in actions to recover, 507.

RECEIVER

- when appointed, 464.
- nature of, 465.
- is officer of court, 466.
- resistance to, contempt of court, 466.
- discretion of court in appointing, 467.
- who may not be, 467.
- attorney in cause, 467.
- persons interested, 467.
- persons of impeached honor, 467.
- next friend or guardian, 468.
- mortgagee, 468.
- trustees, 468.
- officers of corporations, when, 468.
- to be only one of same estate, 468.
- effect of, on statutes of limitation, 466.
- represents all parties, 466.
- who may have, 468.
- stranger cannot, 469.
- attorney general, of banking corporations, 469.
- when appointed, 469.

RECEIVER (*Continued*).

- when appointed before commencement of action, 469.
 - before answer, 470.
- notice of motion for, 470.
 - of eight days, 470.
 - when not required, 470.
- need not be prayed for in pleading, 471.
- on what papers motion for made, 471, 472.
 - in mortgage cases, 472.
 - in partnership cases, 472.
- to whom motion made, 472.
- how appointed, 473.
 - by reference to select, 473.
 - to appoint, 473.
 - proceedings on reference, 473 - 475.
 - after judgment, 513.
- security, 475.
 - referee to fix amount of, 475.
 - how amount of, ascertained, 476.
 - sureties, 476.
 - bond, form and execution of, 477.
 - to be filed, 477.
- report of referee to appoint, 478.
 - confirmation of, 478.
 - review, 478.
- when property vests in, 480, 481, 482.
 - supplementary proceedings, 522.
- liens not affected by, 481.
- what property vests in, 483.
 - property outside state, 483.
 - in supplementary proceedings, 523.
- to take possession of property, 482, 486.
 - in hands of third persons, 482, 483, 486.
 - referee to order delivery, 482.
- may apply to court for instructions, 484.
 - who may apply, 485.
 - notice of application, 485.
 - what attorney may act on, 485.
 - to bring ejectment, 484.
 - to lease premises, 484.
 - to sell bad debts, 484.
- court will protect possession of, 487.
- to account to prior lien holders, 488.

RECEIVER (*Continued.*)

- what attorney may employ, 485.
- must have leave of court to sue, 490.
 - to defend action, 493.
 - to bring ejectment, 488.
 - to let premises for over a year, 488.
 - to pay out money, 489.
 - to sell bad debts, 490.
 - to repair premises, 490.
- how application made, 491.
- when may sue in his own name, 491.
 - to set aside fraudulent conveyance, 492.
- what causes of action vest in, 491.
- may maintain action in another state, 493.
- what must show to maintain action, 491.
- how restrained, 274, 307.
- cannot be sued without leave, 493.
- effect of suing without leave, 493, 494.
- cannot purchase for his own benefit, 490.
- may appoint agent, 482.
- may let premises from year to year, 488.
- must collect rents, 488.
- must serve on tenant certified copy of order appointing him, 488.
- may have order for tenant to attorn, 489.
- may give notice to quit, 489.
- how to proceed in case of partnerships, 489, 501.
- liability of persons interfering with property, 492.
- to keep control of property, 494.
 - not to mix money with his own, 494.
 - to make deposits to separate account, 494.
 - not to loan funds, 494.
 - nor to employ them in trade, 494.
- to file inventory and account yearly, 494.
- final accounting and discharge of, 496.
- substituting one for another, 496.
- compensation of, 497.
- in what actions appointed, 499.
- in action to dissolve partnership, 500.
 - for insolvency, 500.
 - for breach of duty, 500.
 - for trading on private account, 501.
 - for various acts of misconduct, 500-503.
 - limited partnerships, 503.

RECEIVER (*Continued*).

- how to proceed in partnership cases, 500, 504.
- over executors, administrators, etc., 504.
- over trustees, 505.
- in foreclosure suits, 506, 507.
- in actions to recover real estate, 507.
 - for construction of wills, 508.
 - for partition, 507, 508.
 - for specific performance, 508.
- between tenants in common and joint tenants, 509.
- pending appointment of committee of lunatic, 509.
 - guardian of infant, 510.
- to enforce payment of equitable charges on land, 510.
- in divorce suits, 510.
- after judgment to carry the judgment into effect, 511.
 - dispose of property, 512.
- to preserve property pending appeal, 512.
- where judgment debtor refuses to apply property, 513.
- how appointed after judgment, 513.
- in supplementary proceedings, 515.
 - when appointed, 516.
 - where debtor has no property, 517.
 - under section 294, 518.
 - before return of execution, 518.
 - on arrest under sub 4 section 292, 518.
 - on voluntary appearance, 518.
 - at what time made, 519.
 - notice of application, 519.
 - by whom appointed, reference, 520.
 - under control of court, 520.
 - order appointing, how drawn, 520.
 - to be filed, 521.
 - to give and file bond, 521, 522.
 - form and execution of, 521, 522.
 - when vested with property, 522.
 - what property vests in, 523.
 - to take possession of property, 524.
 - powers of, 524, 526.
 - only one to be appointed, 526.
 - forbidding transfer of property, 527.
 - takes property subject to liens, 528.
 - where third person claims property, 528.
 - proceedings thereon, 528, 531.

RECEIVER (*Continued*).

- in creditors' suits, 532-536.
- of corporations, 537. (*See Corporations*).

REDUCING

- bail, 131.

REFERENCE

- on motion to vacate order of arrest, 130.
- to assess damages from injunction, 326, 341.
- to appoint receiver, 473.

RELIGIOUS CORPORATIONS

- injunction of, 300.

REMOVAL

- from state, arrest for, 20.
 - how alleged, 62.
 - ne exeat* for, 571.
- of property to defraud, arrest for, 51.
 - injunction of, 314.
 - attachment for, 365.
 - how proved, 51, 365, 366.

RENTS

- receiver to collect, 488.

REPLEVIN, 141.

- (*See Claim and Delivery*).

REPORT

- of referee to assess damages from injunction, 344.
 - appoint receiver, 478.
 - how reviewed, 478.
 - report receiver, 475, 478.

RESIDENCE

- relating to, 18, 356-361.
- of persons living out of state, but doing business in it, 358.
 - having two habitations, 359.
 - in army or navy, 360.
- of wife living separate, 356, 361.
- of children, 356.

RETURN

- to order of arrest, 85.
- of order of arrest, 69.
 - extending, 69.
- to requisition to take property, 179.
- to attachment, 456, 457.
- to *ne exeat*, 574.

REVIVOR

- of claim and delivery, impossible, 192.
- of injunction suit, 339.

RIPARIAN OWNERS

- rights of, 225, 226.

RIVERS

- to whom beds of, belong, 233. (*See Water Courses*).

SALE

- of land, arrest for fraud in, 47.
 - agreements for, enforced, 244.
- goods on conditional, arrest for, 23.
 - replevin for, 150.
- of negotiable instruments, injunction of, 265.
- of property pending litigation, injunction of, 313.
- of perishable property, 426.
- of attached property, 440.
 - evidences of debt, 440.
 - shares in corporations, etc., 441.
- of bad debts by receiver, 490.

SATISFACTION

- of admitted claim, 561.
 - motion for, 564.
 - order for, 564.
 - how enforced, 564.

SECURITY

- on arrest, 63-65.
- in claim and delivery 174-177.
- on injunction, 324.
 - of actions and judgments, 270, 271, 279.
- on attachment, 381.
 - on discharge of, 445, 451.
- of receiver, 476.
 - in supplementary proceedings, 521.
- to discharge *ne exeat*, 574.

SEDUCTION

- arrest for, 20.

SEPARATION

- in action for; husband enjoined, 307.

SERVICE

- of order of arrest, 71, 72.
 - and affidavits, 71.
- of papers in claim and delivery, 178.

SERVICE (*Continued*).

of injunction, 329.

and affidavits, 319, 330.

of attachment, where property is incapable of manual delivery, 419.

SERVITUDES

(*See Easements*).

SEQUESTRATION

of property of corporation for disobedience to injunction, 301, 333.

SETTLEMENT

where party defrauded makes, 34, 49.

by note, 48, 49.

SHERIFF

to execute order of arrest, 70.

duty of, on receiving order, 71.

serve copies of order and affidavit, 71, 85.

make return to order, 85.

file affidavits, 71.

detain defendant on subsequent process, 84.

when may make arrest, 72.

when defendant claims privilege, 80.

witness, 77.

where may make arrest, 80.

when may break buildings, 80-83.

arrest, how made, 83.

to keep defendant in custody, 85.

to take bail for liberties, 85.

liable for escape, 86.

to return order of arrest, 95.

to serve on plaintiff's attorney, copy bail piece, 95.

to give notice of justification, 96.

on receiving deposit, 102-104.

when liable as bail, 116.

for escape, 116-121.

for rescue, 120.

may make surrender, 107.

may put in bail, 116, 118.

judgment against, 116.

bail liable to, 121.

on executing requisition to take property, 174.

to approve undertaking, 174, 175, 177.

to serve copies of affidavit, etc., 174, 178.

in taking property, 177.

SHERIFF (*Continued*).

on executing requisition in taking property from defendant or agent,
177, 189.

when protected by process, 177, 178, 189.

where concealed in buildings, 177, 179.

in preserving property, 179.

when to deliver property to plaintiff, 179,
181, 183, 186.

when liable to defendant, 181, 182.

to file notice and affidavit, 190.

return, 190.

how to serve injunction, 329.

copy of affidavits, 319.

on executing attachment, 399.

how to proceed, 400.

as on execution, 401, 405, 409.

without delay, 401.

to take possession, 402.

what property, 399, 402-404.

fraudulently assigned, 398.

not to seize property of strangers,
403, 404.

how much to seize, 404.

cannot execute out of county, 405.

in dwellings, 406.

when may break, 406-409.

how long may remain on premises, 409.

must take actual possession, 409.

what is, 409-411.

have property in sight, 410.

against one member of partnership, 411.
limited, 411.

on goods on board vessels, 411.

on real estate, 412.

when becomes trespasser, 402-404.

to make inventory, 400, 413.

how, 143.

fees of appraisers, 457.

effect of, 413.

rights and duties in preserving property,
414, 415.

SHERIFF (*Continued*).

- on attachment has action for injuries to property, 414.
 - degree of care required, 414, 415.
 - how excused on failure to produce property, 415, 416.
 - where property is perishable, 416, 426.
 - to collect debts, 417.
 - may defend action for wrongful levy, 398, 435, 436.
 - may bring actions, 417.
 - to collect debts, 417.
 - may employ attorneys, 418.
 - may allow plaintiff to bring action, 418.
 - to set aside fraudulent conveyance, 435, 436.
- on property incapable of manual delivery, 419.
 - to serve certified copy, 419, 420.
 - notice what to contain, 421.
- where property is claimed by third person, 426.
 - to summon jury, 403, 427.
 - how, 427.
 - effect of verdict, 403, 428.
 - when may require indemnity, 428.
- on attaching vessels, 428-432.
- to retain property, 413, 439.
 - though his term of office has expired 414, 439.
- how to satisfy judgment, 437.
 - apply proceeds of sales, 440.
 - sell property, 440.
 - give certificate of shares, 441.
 - collect notes, debts, etc., 440.
 - sell evidences of debt, 440.
- when to deliver residue to defendant, 442.
- to return warrant, 456.

SHERIFF (*Continued*).

on attachment, liable for error in return, 457.

fees and compensation of, 456-461.

may assign claim
to, 459.

attorney liable for,
459.

on executing *ne exeat*, 573.

to take bond, 573.

SHIPS

enjoining sailing of, 268. (*See Vessels*).

SIGNS

use of, protected by injunction, 263.

SOLDIERS

when exempt from arrest, 74.

residence of, 360.

SPECIFIC PERFORMANCE

injunction in actions for, 241, 252, 304.

receivers in actions for, 508.

SPRINGS OF WATER

underground sources may be cut off, 231.

STAY OF PROCEEDINGS

does not prevent issuing of a provisional remedy, 15.

STOPPAGE IN TRANSITU

attachment of goods subject to, 393, 395.

STOCKS

transfer of, enjoined, 267.

STREAMS

(*See Water Courses*).

STREETS

obstruction of, enjoined, 238.

rail roads in, 245-247.

powers of the corporation of New York as to, 246, 297.

SUBTERRANEAN WATERS

when protected by injunction, 232.

SUITS

injunction of, 269.

creditors, 280.

for specific performance, receiver in, 508.

SUMMARY PROCEEDINGS

for land, injunction of, 277.

SUNDAY

order of arrest not to be returnable on, 69.

arrest not to be made, 72.

after escape may be, 72.

bail may seize defendant on, 106.

SUPERSEDEAS

when had, 138.

SUPPLEMENTARY PROCEEDINGS

receiver in, 515-517.

where no property is discovered, 517.

under section 294, 517.

before return of execution, 518.

after arrest by warrant under sub 4 of section 292, 518.

after voluntary examination, 518.

only one appointed over same property, 526.

when appointed, 519.

how appointed, 520.

notice, 519.

by whom, 520.

reference, 520.

order, how drawn, 520, 526.

to be filed, 521.

copies to be served, 521.

bond, 521.

when property vests, 522.

what property vests, 523.

takes property subject to liens, 528.

immediate possession, 524.

where third persons claim, 524, 528, 529.

powers and duties of, 524, 526.

under control of court, 520.

may impeach fraudulent transfers, 525.

may appoint agent, 525.

restraining disposal by debtor, 527.

third persons, 530.

SUPPORT

of soil from soil, 221.

SURETIES

to undertaking for arrest, 63.

to justify, 64.

of bail, 89. (*See Bail*).

SURETIES (*Continued*).

- to undertaking for jail liberties, 86.
 - for recovery of property, 175 - 176.
 - justification of, 181.
 - for redelivery to defendant, 184, 185.
 - qualifications, 185.
 - for injunction, 324.
 - for attachment, 381, 382.
 - becoming incompetent, 383
 - to discharge attachment, 445.
 - who may be, 452.
 - estopped from impeaching undertaking, 453.
 - for receiver, 476.

SURFACE WATER

- flowing from upper to lower lands, 232.

SURRENDER

- of defendant, when, 105, 107.
 - how, 105.
 - may seize defendant, 106.
 - where defendant is in prison, 112.
- extending time to, 107.
 - ground for, 104.
- sheriff becoming liable, may make, 107.

TAXES

- injunction of, 250.
- property taken for, cannot be replevied, 152.
- how tenant for life compelled to pay, 510.

TENANTS

- removing fixtures, 157 - 163.
 - what articles, 157 - 163.
 - buildings erected by, 160.
 - within what time, 160 - 162.
- for life*, may enjoin waste, 213.
 - how compelled to pay taxes, 510.
- liable for waste, 214.
 - by curtesy, or in dower, 214.
 - what is not waste in, 215, 216.
 - mines, 216.
 - timber and trees, 215.
 - removing fixtures, 216.
- of water power, when not liable for breach of injunction against lessor, 202.

TENANTS (*Continued*).

- enjoining breach by, of covenants in lease, 242.
- injunction of summary proceedings to remove, 277.
- to attorn and pay rent to receiver, 488.
- in common*, replevin between, 155.
 - injunction of waste between, 213, 214.
 - receivers between, 504.
- joint*, receivers between, 504.

TENDER

- of property, in claim and delivery, effect of, 143.

TIMBER

- waste in, 215.

TITLE

- to office, injunction in suits to test, 308.
- cloud on, enjoining transfer of deeds that are, 268.
 - taxes that are, 251.

TRADE MARK

- enjoining infringement of, 258-264.
 - imitations of, 259.
 - deceptive marks, 262.
- denoting *quality* not enjoined, 261.
- names in common use not enjoined, 261.
- arising from similarity of parties' names, 263.
- consent to use, 255.

TRANSFER

- of negotiable paper enjoined, 265.
- of stocks enjoined, 267.

TREES

- waste in, 215.
- line, cutting of, enjoined, 212.

TRESPASS

- injunction of, 210.
- unauthorized levy by officer is, 147.
- when attachment of property is, 402-404.

TRUSTEES

- may have replevin, 145.
- injunction of, 306.
- attachment of, 372.
- receiver over, 505.

UPPER LAND

- easement to discharge water on lower, 232.

UNDERTAKING

- for arrest, 63.
 - necessary, 63.
 - amount of, 64.
 - to be proved and acknowledged, 64.
 - judge's approval to be indorsed on, 64.
 - to be filed, 65.
- of bail, 89.
 - sureties to, 89, 91, 92.
 - to be acknowledged, 94.
 - how disposed of, 94.
 - for arrest under sub 3, § 179, 90.
 - cannot be treated as nullity, 92.
 - certified copy of, to be given to plaintiff, 95.
 - judge to indorse allowance on, 100.
 - to be filed, 100.
- in claim and delivery, 174.
 - form of, 175.
 - amendment of, 175.
 - action on, 176.
 - sureties to, 176.
 - how disposed of, 177, 183.
- for redelivery of property, 185.
 - how disposed of, 186.
 - when evidence of possession, 186.
 - action on, 187.
- where property is claimed by third person, 190.
- for injunction, 325.
 - form and execution, 325-327.
 - justice to indorse approval on, 327.
 - to be filed, 327.
 - how damages on, assessed, 341.
- for attachment, 381.
 - form and execution, of, 381-383.
 - who may take advantage of defects in, 382.
 - to be approved and filed, 383.
 - defects in, do not discharge sureties, 383.
 - action on, 383.
 - damages on, 384.
 - continues on appeal, 384.
- where plaintiff, in attachment suit desires to bring action, 442.
- for discharge of attachment, 445.
 - form, 452.

UNDERTAKING (*Continued*).

- for discharge of attachment, sureties in estopped from impeaching it, 453, 454.
- of receiver, 477.
 - in supplementary proceedings, 521.
- to discharge *ne exeat*, 573.

VACATING

- order of arrest, 66, 122.
- injunction, 334.
- attachment, 444.

VENDOR

- need not inquire as to truth of representations, 43.
- may replevy goods sold conditionally, 150.
- when accountable for defect in goods, 48.

VENDEE

- not bound to declare insolvency, 41.
- obtaining goods with intent not to pay, 42, 44.
- of goods sold conditionally liable to replevin, 150.

VERDICT

- form of, in claim and delivery, 165.

VESSELS

- goods on board of, how attached, 411.
- how attached, 428.

WALLS

- (*See Party-walls*).

WARRANT OF ATTACHMENT

- (*See Attachments*).

WASTE

- injunction of, 212.
 - who may have, 213.
 - against whom, 212-216.
- subject of, 215-217.

WATER COURSES

- enjoining obstruction or diversion of, 224.
- rights of proprietors in, 224-233.
 - cannot obstruct or divert, 225.
 - how far may use, 226-230.
- of mill owners in, 226-230.
 - to erect dams, 227.
 - to use reasonably, 227.
 - what use unreasonable, 227-228.
 - cannot divert, 230.

WATER COURSES (*Continued*).

- right of mill owners to set back water, 228.
 - to flow by prescription, 228.
 - to divert by prescription, 229.
- subterranean, 232.
- when navigable, 233.

WELL OF WATER

- sources of, may be cut off by adjoining proprietor, 231.

WIFE

- living separate, domicil of, 356, 361.

WILLS

- receivers in action for construction of, 508.

WINDOWS

- of tenements, landlord may darken, 219.

WITNESS

- privileged from arrest, 76, 77.

WRONGFUL

- taking of property, replevin for, 147.

